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216
No. 2463

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Arizona.

Filed

AUG 27 1914

F. D. Monckton,
Clerk.

No. 2463

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Arizona.

No 2423

United States

Circuit Court of Appeals

For the Fifth Circuit

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

JOHN W. BROWN, Defendant.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

JOHN W. BROWN, Defendant.

Appeal from the Circuit Court of the District of Columbia.

Filed for record at the Clerk's Office of the Circuit Court of the District of Columbia, this 1st day of January, 1901.

Witness my hand and the seal of the Circuit Court of the District of Columbia, this 1st day of January, 1901.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Complaint.]

*In the District Court of the United States for the
District of Arizona, ——— Division.*

No. 2098.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Now comes the United States of America, by Joseph E. Morrison, United States Attorney for the District of Arizona, and brings this action on behalf of the United States against the Southern Pacific Company, a corporation organized and doing business under the laws of the State of Kentucky, and having an office and place of business at Benson, in the State of Arizona; this action being brought upon suggestion of the Attorney General of the *United at* the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at

Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M., on December 21, 1912, upon its line of railroad at and between [1*] the stations of Lordsburg, in the State of New Mexico, and Cochise, in the State of Arizona, within the jurisdiction of this court, required and permitted its certain engineer and employee, to wit: Billy F. Eaker, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:30 o'clock A. M., on said date, to the hour of 10:29 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A SECOND CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes

*Page number appearing at foot of page of original certified Record.

at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M., on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Cochise, in the State of Arizona, within the jurisdiction of this court, required and permitted its certain fireman and employee, to wit: Frank H. Kempf, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:30 [2] o'clock A. M., on said date, to the hour of 10:29 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A THIRD CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the

hour of 5:30 o'clock A. M., on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Benson, in the State of Arizona, within the jurisdiction of this court, required and permitted its certain conductor and employee, to wit: B. T. Sullivan, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:30 o'clock A. M., on said date, to the hour of 12:40 o'clock A. M., on December 22, 1912.

Plaintiff further alleges that said employee, while required [3] and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A FOURTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M., on December 21, 1912,

upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Benson, in the State of Arizona, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit: W. E. Brown, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:30 o'clock A. M., on said date, to the hour of 12:40 o'clock A. M., on December 22, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, said train being then and there engaged in the movement of [4] interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A FIFTH CAUSE OF ACTION,

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M., on December 21, 1912, upon its line of railroad at and between the stations

of Lordsburg, in the State of New Mexico, and Benson, in the State of Arizona, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit: H. F. Peacock, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:30 o'clock A. M., on said date, to the hour of 12:40 o'clock A. M., on December 22, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[5]

FOR A SIXTH CAUSE OF ACTION,
plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M., on December 21, 1912, upon its line of railroad at and between the stations

of Lordsburg, in the State of New Mexico, and Benson, in the State of Arizona, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit: C. G. Harrison, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:30 o'clock A. M., on said date, to the hour of 12:40 o'clock A. M., on December 22, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[6]

FOR A SEVENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:20 o'clock A. M., on December 22, 1912, upon its line of railroad at and between the stations

of Tucson, in the State of Arizona, and Bowie, in said State, within the jurisdiction of this court, required and permitted its certain engineer and employee, to wit: C. J. Maben, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:20 o'clock A. M., on said date, to the hour of 10:50 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2794, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[7]

FOR AN EIGHTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:20 o'clock A. M., on December 22, 1912, upon its line of railroad at and between the stations

of Tucson, in the State of Arizona, and Bowie, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employee, to wit: J. E. Anderson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:20 o'clock A. M., on said date, to the hour of 10:50 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2794, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[8]

FOR A NINTH CAUSE OF ACTION,
plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant beginning at the hour of 5:20 o'clock A. M., on December 22, 1912, upon its line of railroad at and between the stations

of Tucson, in the State of Arizona, and Bowie, in said State, within the jurisdiction of this court, required and permitted its certain conductor and employee, to wit: C. A. Owens, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:20 o'clock A. M., on said date, to the hour of 10:50 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2794, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[9]

FOR A TENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:20 o'clock A. M., on December 22, 1912, upon its line of railroad at and between the stations

of Tucson, in the State of Arizona, and Bowie, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit: J. F. Weathered, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:20 o'clock A. M., on said date, to the hour of 10:50 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2794, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[10]

FOR AN ELEVENTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:20 o'clock A. M., on December 22, 1912, upon its line of railroad at and between the stations

of Tucson, in the State of Arizona, and Bowie, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit: G. Davis, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:20 o'clock A. M., on said date, to the hour of 10:50 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2794, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[11]

FOR A TWELFTH CAUSE OF ACTION, plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:20 o'clock A. M., on December 22, 1912, upon its line of railroad at and between the stations

of Tucson, in the State of Arizona, and Bowie, in said State, within the jurisdiction of this court, required and permitted its certain trainman and employee, to wit: E. Leinen, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 5:20 o'clock A. M., on said date, to the hour of 10:50 o'clock P. M., on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2794, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[12]

WHEREFORE, plaintiff prays judgment against said defendant in the sum of six thousand dollars and its costs herein expended.

(Signed) JOSEPH E. MORRISON,

United States Attorney.

[Endorsements]: No. 5—Tucson. (No. 100.) District Court of United States, District of Arizona. The United States of America vs. Southern Pacific Company. Complaint—16 Hours' Service Law. Filed Aug. 14, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. [13]

*In the United States District Court, for the District
of Arizona.*

No. 100.

UNITED STATES OF AMERICA

vs.

SOUTHERN PACIFIC COMPANY,

Summons.

Action Brought in the United States District Court
for the District of Arizona.

The President of the United States of America,
Greeting: To Southern Pacific Company, a
Corporation,

YOU ARE HEREBY SUMMONED and required to appear in an action brought against you by the above-named plaintiff in the United States District Court for the District of Arizona, and answer the complaint therein filed with the Clerk of this said Court, at Phoenix, in said District within twenty days after service upon you of this Summons, if served in this said District, or in all other cases within thirty days thereafter, the time above mentioned being exclusive of the day of service, or judgment by default may be taken against you.

Given under my hand and the seal of the United States District Court for the District of Arizona, this 14 day of August, A. D. 1913.

[Seal] (Signed) ALLAN B. JAYNES,
Clerk of said District Court.
By Frank E. McCrary,
Deputy.

U. S. MARSHAL'S RETURN.

Received this writ at Phoenix, Ariz., Aug. 14, 1913, and executed the same Aug. 16, 1913, at Tucson, Ariz., by delivering a true and certified copy hereof, to which was attached a copy of the bill of complaint filed herein, to Alfred Doneau. The said Alfred Doneau at the time being the Statutory Agent of the defendant corporation the Southern Pacific Company.

(Signed) C. A. OVERLOCK,
U. S. Marshal.
By D. N. Willits,
Chief Deputy.

Marshal's fees in service	\$4.00
Expenses of service	17.95
	<hr/>
	\$21.95

[Endorsements]: Marshal's Docket No. 358. No. 100. No. 5 (Tucson). United States District Court District of Arizona. United States of America vs. Southern Pacific Co. Summons. Filed Aug. 18, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. [14]

[Answer.]

*In the District Court of the United States, for the
District of Arizona.*

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
SOUTHERN PACIFIC COMPANY,
Defendant.

Comes now the above-named defendant, Southern Pacific Company, and answering plaintiff's complaint on file herein, admits and denies as follows:

Admits that it is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and that it has an office and place of business at Benson, in the State of Arizona.

Admits that during all the times mentioned in plaintiff's complaint herein defendant was and is a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Answering plaintiff's alleged first cause of action, set out in its complaint on file herein, defendant specifically denies that in violation of the act of Congress known as "An Act to promote the safety of employees and travelers on railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), that this defendant, beginning at the hour of 5:30 o'clock A. M. on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Cochise, in the State of [15] Arizona, within the jurisdiction of this court, or at any other time, or place, or at all, required or permitted its certain engineer and employee, to wit: Billy F. Eaker, to be and remain on duty as such for a longer period than sixteen consecutive hours.

Admits that the said Billy F. Eaker was employed by the defendant herein, and on the dates mentioned in plaintiff's complaint was engaged in and connected with the movement of said defendant's train, extra,

drawn by its own locomotive engine No. 2813, and that the said train was then and there engaged in the movement of interstate traffic; but denies that defendant required or permitted Billy F. Eaker to remain on duty continuously for more than sixteen consecutive hours as charged in plaintiff's complaint.

Defendant denies that at the time and place or times and places alleged in plaintiff's complaint, or at any other time or place, that this defendant violated the said Act of Congress referred to in plaintiff's complaint, and denies that this defendant is liable to the plaintiff in the sum of five hundred dollars, or in any other sum, or amount, or at all.

Answering plaintiff's alleged second cause of action, set out in its complaint on file herein, defendant specifically denies that in violation of the act of Congress known as "An Act to promote the safety of employees and travelers on railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), that this defendant, beginning at the hour of 5:30 o'clock A. M. on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Cochise, in the State of [16] Arizona, within the jurisdiction of this court, or at any other time, or place, or at all, required or permitted its certain fireman and employee, to wit: Frank H. Kempf, to be and remain on duty as such for a longer period than sixteen consecutive hours.

Admits that the said Frank H. Kempf was employed by the defendant herein, and on the dates

mentioned in plaintiff's complaint was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, and that the said train was then and there engaged in the movement of interstate traffic; but denies that defendant required or permitted Frank H. Kempf to remain on duty continuously for more than sixteen consecutive hours as charged in plaintiff's complaint.

Defendant denies that at the time and place or times and places alleged in plaintiff's complaint, or at any other time or place, that this defendant violated the said act of Congress referred to in plaintiff's complaint, and denies that this defendant is liable to the plaintiff in the sum of five hundred dollars, or in any other sum, or amount, or at all.

Answering plaintiff's alleged third cause of action, set out in its complaint on file herein, defendant specifically denies that in violation of the act of Congress known as "An act to promote the safety of employees and travelers on railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), that this defendant, beginning at the hour of 5:30 o'clock A. M. on December 21, 1912, upon its [17] line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Cochise, in the State of Arizona, within the jurisdiction of this court, or at any other time, or place, or at all, required or permitted its certain conductor and employee, to wit: B. T. Sullivan, to be and remain on duty as such for a longer period than sixteen

consecutive hours.

Admits that the said B. T. Sullivan was employed by the defendant herein, and on the dates mentioned in plaintiff's complaint was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, and that the said train was then and there engaged in the movement of interstate traffic; but denies that defendant required or permitted B. T. Sullivan to remain on duty continuously for more than sixteen consecutive hours as charged in plaintiff's complaint.

Defendant denies that at the time and place or times and places alleged in plaintiff's complaint, or at any other time or place, that this defendant violated the said act of Congress referred to in plaintiff's complaint, and denies that this defendant is liable to the plaintiff in the sum of five hundred dollars, or in any other sum, or amount, or at all.

Answering plaintiff's alleged fourth cause of action, set out in its complaint on file herein, defendant specifically denies that in violation of the act of Congress known as "An Act to promote the safety of employees and travelers on railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes [18] at Large, page 1415), that this defendant, beginning at the hour of 5:30 o'clock A. M. on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Cochise, in the State of Arizona, within the jurisdiction of this court, or at any other time, or place, or at all, required or permitted its certain trainman

and employee, to wit: W. E. Brown, to be and remain on duty as such for a longer period than sixteen consecutive hours.

Admits that the said W. E. Brown was employed by the defendant herein, and on the dates mentioned in plaintiff's complaint was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, and that the said train was then and there engaged in the movement of interstate traffic; but denies that defendant required or permitted W. E. Brown to remain on duty continuously for more than sixteen consecutive hours as charged in plaintiff's complaint.

Defendant denies that at the time and place or times and places alleged in plaintiff's complaint, or at any other time or place, that this defendant violated the said act of Congress referred to in plaintiff's complaint, and denies that this defendant is liable to the plaintiff in the sum of five hundred dollars, or in any other sum, or amounts, or at all.

Answering plaintiff's alleged fifth cause of action, set out in its complaint on file herein, defendant specifically denies that in violation of the act of Congress known as "An Act to promote the safety of employees and travelers [19] on railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), that this defendant, beginning at the hour of 5:30 o'clock A. M. on December 21, 1912, upon its line of railroad at and between the stations of Lordsburg, in the State of New Mexico, and Cochise, in the State of Arizona, within the jur-

isdiction of this court, or at any other time, or place, or at all, required or permitted its certain trainman and employee, to wit: H. F. Peacock, to be and remain on duty as such for a longer period than sixteen consecutive hours.

Admits that the said H. F. Peacock was employed by the defendant herein, and on the dates mentioned in plaintiff's complaint was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, and that the said train was then and there engaged in the movement of interstate traffic; but denies that defendant required or permitted H. F. Peacock to remain on duty continuously for more than sixteen consecutive hours as charged in plaintiff's complaint.

Defendant denies that at the time and place or times and places alleged in plaintiff's complaint, or at any other time or place, that this defendant violated the said act of Congress referred to in plaintiff's complaint, and denies that this defendant is liable to the plaintiff in the sum of five hundred dollars, or in any other sum, or amount, or at all.

Answering plaintiff's alleged sixth cause of action, set out in its complaint on file herein, defendant specifically [20] denies that in violation of the act of Congress known as "An Act to promote the safety of employees and travelers on railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), that this defendant, beginning at the hour of 5:30 o'clock A. M. on December 21, 1912, upon its line of railroad at and between the

stations of Lordsburg, in the State of New Mexico, and Cochise, in the State of Arizona, within the jurisdiction of this court, or at any other time, or place, or at all, required or permitted its certain trainman and employee, to wit: C. G. Harrison, to be and remain on duty as such for a longer period than sixteen consecutive hours.

Admits that the said C. G. Harrison was employed by the defendant herein, and on the dates mentioned in plaintiff's complaint was engaged in and connected with the movement of said defendant's train, extra, drawn by its own locomotive engine No. 2813, and that the said train was then and there engaged in the movement of interstate traffic; but denies that defendant required or permitted C. G. Harrison to remain on duty continuously for more than sixteen consecutive hours as charged in plaintiff's complaint.

Defendant denies that at the time and place or times and places alleged in plaintiff's complaint, or at any other time or place, that this defendant violated the said act of Congress referred to in plaintiff's complaint, and denies that this defendant is liable to the plaintiff in the sum or five hundred dollars, or in any other sum, or amount, or at all.

[21]

Defendant, for its answer herein to plaintiff's alleged causes of action Nos. 7, 8, 9, 10, 11 and 12, in its complaint herein contained, admits that during all the times mentioned therein it was a common carrier engaged in interstate commerce by railroad in the State of Arizona.

Admits that the persons named in the above-

numbered counts in plaintiff's complaint were at the time mentioned employees of the defendant company.

Admits that the said persons, constituting the crew of extra No. 2794, mentioned in plaintiff's complaint, were called to leave Tucson at 5:50 A. M., which would put them on duty at 5:20 A. M. of the date mentioned, and were each and all of them relieved at 10:50 P. M. of the same date.

The defendant alleges, by way of relief and exoneration from the provisions of the statute in plaintiff's said complaint set out, that the said extra train No. 2794 was delayed and detained en route at a station called Esmond, in the county of Pima, State of Arizona, while en route on the day and date named in plaintiff's complaint for the period of one hour and thirty minutes on account of and by reason of the said train breaking-in-two, and that the said break-in-two and delay of one hour and thirty minutes was the result of a cause not known to the defendant or its officers, agents, or any of them in charge of said train and of such employees at the time said train and employees left Tucson, the terminal, from which it started at — A. M. on said date; and that the same was caused by an unavoidable accident and one that could not have been foreseen by this defendant or any of its officers, agents or employees; all of which and the [22] time of delay was promptly reported to the Interstate Commerce Commission by the defendant herein, together with the defendant's claim of exemption for the one hour and thirty minutes delay at Esmond as aforesaid.

Wherefore, defendant prays that the delay of one hour and thirty minutes, by reason of the unavoidable accident as aforesaid, be allowed defendant, and that the provisions of this act shall not apply to this defendant in the alleged causes of action contained in counts seven, eight, nine, ten, eleven and twelve set forth in plaintiff's complaint, and that the defendant go hence without day, together with its costs.

(Signed) FRANK COX and
FRANCIS M. HARTMAN,
Attorneys for Defendant.

[Endorsements]: No. 5 (Tucson). In the District Court of the United States for the District of Arizona. The United States of America, Plaintiff, vs. Southern Pacific Company, Defendant. Defendant's Answer. Filed Sept. 18, 1913, Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. Frank Cox, Phoenix, Arizona, Francis M. Hartman, Tucson, Arizona, Attorneys for Defendant. Received copy of this answer on September 19, 1913. J. E. Morrison, U. S. Attorney. [23]

The following is a copy of the minute entry made on May 21, 1914:

[Minutes of Court—May 21, 1914.]

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Order Overruling Demurrer, etc.

On this day this cause came on for hearing on the demurrer of the plaintiff to the answer of the defendant to the 7th, 8th, 9th, 10th, 11th and 12th cause of action set forth in the complaint, and said demurrer was thereupon argued by M. C. List, Esquire, on behalf of the plaintiff, and by Francis M. Hartman, Esquire, on behalf of the defendant, and was submitted to the Court for decision, and thereupon it was ordered that said demurrer be overruled, to which order and ruling of the Court the plaintiff, by its counsel, then and there in open court excepted. The plaintiff declined to amend its complaint with respect to the 7th, 8th, 9th, 10th, 11th and 12th, causes of action set forth therein, and declined to plead further with respect thereto but elected to stand upon the pleadings, and thereupon the cause was called for trial upon the 1st, 2d, 3d, 4th, 5th and 6th cause of action set forth in the complaint. Whereupon the Clerk was ordered to draw eighteen names from the box wherein he had deposited in the presence of the Court the names of the jurors summoned and not excused, and the names of eighteen persons were thereupon drawn and all answering thereto respectively, took their places in the jury-box. The said jurors were then sworn and examined on their *voir dire*. The panel being now full and complete and said jurors in the jury-box having been passed for cause by both the plaintiff and the defendant, the respective parties exercised their right of peremptory challenge and the follow-

ing named jurors were called according to law to constitute the jury, viz.: A. Sahperd, J. W. Kellum, Richard Starr, Harry P. Suman, Kenneth Brown, H. F. Schurrer, W. G. Powers, J. E. Lindley, S. M. Warner, C. A. Beardsley, Wm. Powers, and Don Blankenship, who were duly sworn to well and truly try the issues joined between [24] the United States of America and the defendant herein. E. B. Van Vreen was duly sworn as court reporter herein. The respective counsel then read aloud the pleadings herein to the jury and stated the issues to be tried herein. Upon motion of the plaintiff, it is ordered that all witnesses be called and placed under the rule, and thereupon Frank H. Kempf, Billy F. Eaker, B. T. Sullivan, H. J. Peacock, C. Q. Harrison, and J. H. Dyer, were called as witnesses for the plaintiff, sworn, and placed under the rule; and W. Wilson, J. E. Lovejoy, were called, as witnesses for the defendant, sworn, and placed under the rule. The plaintiff then, to maintain upon its part the issues herein, called as witness Wm. Wilson, who was duly examined and cross-examined, and offered two exhibits, Exhibit "A" and "B," which were admitted in evidence and filed, and this being the regular time for adjournment of this court, the Court duly instructed the jury and excused them from further service in this case until Friday, the 22d day of May, A. D. 1914, at ten o'clock A. M., to which time the further trial of this case is now ordered continued.

[25]

No. 5—(TUCSON).

UNITED STATES OF AMERICA,

Plaintiff,

Against

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the said plaintiff as to each and all of the counts from one to six inclusive.

(Signed) K. B. BROWN,

Foreman.

[Endorsements]: No. 5 (Tucson). District Court of the United States, District of Arizona. United States of America, Plaintiff, vs. Southern Pacific Company, Defendant. Verdict. Filed May 22, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. [26]

No. 5.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Judgment.

This cause came on for trial before the above-named court on the 21st day of May, 1914, at the regular May, 1914, Term thereof, held at Tucson, Thomas A. Flynn, United States Attorney, M. C. List, and Samuel L. Pattee, appearing as attorneys for the plaintiff, and Francis M. Hartman, Esquire, and B. O. Baker, Esquire, appearing as attorneys for the defendant; thereupon the plaintiff demurred to the answer of the defendant to the seventh, eighth, ninth, tenth, eleventh and twelfth causes of action set forth in the complaint of plaintiff and, after argument, it was ordered that said demurrer be overruled; thereupon a jury was duly empaneled and the cause proceeded to trial upon the first, second, third, fourth, fifth and sixth causes of action set forth in the complaint, and evidence was introduced on behalf of the respective parties, and at the close of the evidence the Court instructed the jury to return a verdict in favor of the plaintiff upon the first, second, third, fourth, fifth and sixth causes of action aforesaid, and thereupon the jury returned a verdict in favor of the plaintiff upon each and all of said causes of action; and the plaintiff having elected to stand upon its demurrer to the answer to the seventh, eighth, ninth, tenth, eleventh and twelfth causes of action and not to plead further with respect thereto, it was ordered that judgment be entered in favor of the defendant upon those causes of action; thereafter the Court fixed and determined the penalty to be imposed upon each of the causes

of action so found in favor of the plaintiff as follows, upon the first and second causes of action at the sum of One Dollar (\$1.00) each, and upon the third, fourth, fifth and sixth causes of action, at the sum of One Hundred Dollars (\$100.00) each, and did order that judgment be entered accordingly:

Now, therefore, pursuant to said orders for judgment and the [27] proceedings aforesaid, it is hereby

ORDERED, ADJUDGED AND DECREED, that the plaintiff, the United States of America, do have and recover of and from the defendant, Southern Pacific Company, a corporation, the sum of Four Hundred and Two Dollars (\$402.00), the amount of the penalties fixed as aforesaid, and that it do have execution therefor.

And it is further ORDERED, adjudged and decreed, that the said plaintiff take nothing by the seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action in its complaint, and that as to each and all those causes of action the defendant go hence without day.

And it is FURTHER ORDERED, ADJUDGED AND DECREED, that neither party recover any costs against the other, but that each party pay all costs incurred by it.

In accordance with stipulation this day made by the parties hereto, it is ORDERED that the execution on said judgment be stayed for forty-two days from the date of said verdict. [28]

*In the United States District Court for the District
of Arizona.*

No. 5—TUCSON.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that on the 22d day of May, 1914, the above-entitled cause came on for trial before the above-entitled court and a jury duly impaneled, Honorable William H. Sawtell, presiding. Plaintiff appearing by Messrs. Samuel L. Pattee and Monroe C. List, its counsel, and the defendant appearing by Francis M. Hartman and B. O. Baker, its counsel, and the following proceedings were had:

[Testimony of William Wilson, for Plaintiff.]

WILLIAM WILSON, called as a witness on behalf of the plaintiff and first duly sworn, testified as follows:

Direct Examination.

(By Mr. LIST.)

My name is William Wilson. I am chief dispatcher of the Southern Pacific Company at Tucson, Arizona; have occupied that position for about six years. My duties as dispatcher are to keep a record of train and engine men, as to the time that they are

(Testimony of William Wilson.)

called and the time that they are released or go off duty, fill orders for cars, keep a record of the engines and cars, see that passenger and freight trains make time and in general everything pertaining to the hours of service of train men and engine men. In December, 1912, the trains between Lordsburg and Benson were in my jurisdiction. (Witness here identifies train sheet handed him by counsel for [29] plaintiff.) This train sheet shows the train number, crews of the trains, conductors, engineers, firemen, engine number, the time they were called and relieved at different points. This train sheet was started at 12:01 A. M. and all the trains starting on their run at or after 12:01 A. M. are kept on this sheet until they have finished their run. This train sheet is made by the train dispatcher who is under my jurisdiction and under my orders. This is an official record of the company. (Witness identifies another train sheet handed him by counsel for plaintiff.) This train sheet shows train extra, engine No. 2813, December 21st, 1912, which was a local freight train running between Lordsburg and Benson. The employees on that train were called to leave on the morning of December 21st, 1912, for six A. M., which placed them on duty at 5:30 A. M. Mr. B. F. Eaker, Mr. Frank H. Kempf, Mr. B. T. Sullivan, Mr. W. E. Brown, Mr. H. F. Peacock and Mr. C. G. Harrison were the employees engaged in connection with the movement of this train. They had orders to take that train to Bowie when they reported at 5:30 A. M. When they started with that train from Lordsburg

(Testimony of William Wilson.)

their objective point was Benson. Benson was the final destination of the train. It arrived at Benson at 12:25 A. M. December 22d, 1912. Only a part of *the these* employees were still engaged in and connected with the movement of this train when it arrived at Benson, Conductor Sullivan and Brakemen Brown, Peacock and Harrison, and they were released from all service in connection with that train on December 22d, at 12:40 A. M. This train sheet does not show that they were in continuous service from the time they reported at Lordsburg until they were relieved at 12:40 A. M. December 22d. It shows a break in the service with respect to the conductor and the three brakemen. It shows that they [30] were relieved at Bowie at 9:15 A. M. until 11:40 A. M. and again at 1:20 P. M. until 2:20 P. M. and the balance of the time outside of these two releases they were in continuous service. The purpose of the first release at Bowie from 9:15 A. M. to 11:40 A. M. two hours and twenty-five minutes, was that it was necessary to use their engine for other service and their train was on the siding at Bowie, so far as I could say. This release was sent to the men by a message to the agent at Bowie. The agent is supposed to have delivered the message, he is the one in charge of that. We kept this message in the office of the chief dispatcher. (Witness here identified copy of message handed to him by counsel for the plaintiff, which document was thereupon offered in evidence by plaintiff, admitted and marked Government's Exhibit "A," and which is hereinafter

(Testimony of William Wilson.)

fully set forth.) This message was signed by dispatcher Glenn. He was on duty at that time. "W. H. L." referred to in this message is W. H. Lawrence, Agent at Bowie, and the initials "W. W." are my initials. The notation on the train sheet that these employees were relieved from 9:15 to 11:40 was made from the message received from the conductor. That notation was made by dispatcher Glenn, who was on duty at that time from eight in the morning until four in the afternoon. I have a copy of the message signed by the conductor to the dispatcher.

(Witness here identifies copy of message handed him by counsel for plaintiff, which was offered in evidence by the plaintiff, and admitted and marked Government's Exhibit "B," and which is hereinafter fully set forth.) The letters "Bo." on this message is the call for Bowie, and [31] it shows that it was received at 1:58 P. M. by "G."—by Mr. Glenn. I don't know what character of release was given to the conductor and brakemen at Bowie. There was a message sent to the conductor at Bowie, relieving the conductor and brakemen from 1:20 P. M. to 2:20 P. M. but no copy of this message was retained. I could not at this time say positively what the purpose of that release was. I did not make any report that this hour was allowed them for dinner. The engineer and fireman of this train were finally relieved at 10:29 P. M. December 21, 1912, at Cochise.

Q. (By Counsel for Government.) Do you know whether or not they were paid for continuous service

(Testimony of William Wilson.)

from 5:30 A. M. until 10:29 P. M. ?

Which question was objected to by counsel for the defendant on the ground that the same was irrelevant and immaterial and that the question as to whether or not the men were paid for the time from 5:30 A. M. to 10:29 P. M. had nothing whatever to do with this case. This objection was overruled by the Court and to the ruling of the Court the defendant then and there by its counsel excepted on the record.

A. I cannot answer that, I don't know. The engineer and fireman of this train, B. F. Eaker and Frank H. Kempf, were released at Bowie at 1:30 P. M. to 2:30 P. M. The record does not show for what purpose. Outside of that one hour for which they were released at Bowie, they were in continuous service from 5:30 A. M. to 10:29 P. M. That release to the engineer and fireman was sent over the wire in the form of a message, I could not say to whom it was addressed, but it was sent by some one in the office of the Chief Dispatcher—Mr. Glenn—I know I told the dispatcher, Mr. Glenn to send it. The notation here on the train sheet of the engineer and fireman being relieved one hour at Bowie, [32] from 1:30 to 2:30 P. M., is made in the handwriting of Patrick Flynn, a dispatcher who came on duty at four P. M.

Cross-examination.

(By Mr. HARTMAN.)

(Witness handed train sheet by counsel for defendant.)

“This is the train sheet showing train extra west—shows the number of the train, the number of the en-

(Testimony of William Wilson.)

gine on the train, the conductor's name—it shows that the train was called to leave Lordsburg at 6:00 A. M., and shows the time it arrived at Bowie, and the time they were relieved and went on duty again at Bowie, the time the engine crew was released at Cochise and the time the train crew was released at Benson. The trainmen and the enginemen are directly under me as to when they shall leave a terminal and when they shall be relieved."

Q. (By Counsel for Defendant.) What are the instructions issued to you from the Superintendent or from the officers of the company over you with reference to complying with the provisions of what is known as the sixteen hour law?

To which counsel for the Government objected, which objections was sustained and to which ruling of the Court the defendant, by its counsel, then and there excepted on the record.

Q. Did you as chief dispatcher issue any instructions or did you at that time as such chief dispatcher issue any instructions to the employees of the company directly under you, including trainmen and enginemen, with reference to abiding by all the provisions of what is known as the sixteen hour law?

A. Yes, sir. [33]

To which question and answer the Government, by its counsel, objected, which objection was sustained by the Court and the answer ordered stricken out. To which ruling of the Court defendant, by its counsel, then and there excepted on the record.

While I was chief dispatcher of this division there

(Testimony of William Wilson.)

were instructions issued in writing to the employees that they were not to perform any service in excess of sixteen hours.

(Witness identifies a document handed to him by counsel for defendant, and which was marked for identification "Defendant's Exhibit 3," and which is hereinafter fully set forth.)

I have seen this document (referring to document marked "Defendant's Exhibit 3 for Identification") on file in the files of my office. This is one of the instructions issued by the company with reference to the sixteen hour law. It was issued February 11, 1910.

(Witness identifies another document shown him by counsel for defendant, which is marked for identification "Defendant's Exhibit 4," and is hereinafter fully set forth.)

I have seen this before or a copy of it or one just like it on file in my office. It is a bulletin and is a reissue of all bulletins in effect on the Tucson Division, and was issued August 16, 1912. These bulletins when they were issued were posted on the different bulletin-boards and copies sent to the different departments and to those to whom they were issued.

(Witness identifies another document handed him by counsel for defendant, which is marked for identification "Defendant's Exhibit No. 5," which is hereinafter fully set forth.) [34]

I have seen this document. There is a copy of it on file in my office on what we call the "Sixteen Hour File." We keep a regular file in my office with

(Testimony of William Wilson.)

reference to the sixteen hour law.

Hereupon a recess was taken until Friday, May 23d, 1914, at ten o'clock A. M.

Friday, May 23d, 1914, 10:00 A. M.

WILLIAM WILSON, on the stand.

Cross-examination (Continued).

(Witness handed a document marked for identification "Defendant's Exhibit No. 5.")

Mr. W. H. Whalen, who signed this document, was at that time Superintendent of the Tucson Division of the Southern Pacific Company, which includes that portion of the road from Lordsburg to Benson. The regular run of this train referred to, Extra West, Engine No. 2813, December 21, 1912, was from Lordsburg to Benson. It was a local freight train.

Q. (By Counsel for Defendant.) How long were these men on duty?

Which question was objected to by counsel for the Government as calling for a conclusion of the witness, the objection sustained by the Court, and defendant, by its counsel, excepted on the record.

When this train reached Bowie the conductor and three brakeman were relieved from duty from 9:15 A. M. until 11:40 P. M. From the time that they went on duty at 5:30 A. M. at Lordsburg, until they were relieved at Bowie, at 9:15 A. M., is three hours and forty-five minutes, and they were relieved from 9:15 A. M. to 11:40 A. M., two hours and forty-five minutes. [35] During the time that they were relieved, two hours and twenty-five minutes, they were

(Testimony of William Wilson.)

in the town of Bowie. From 1:20 P. M. to 2:20 P. M. they were also relieved at Bowie one hour. They were at Bowie altogether five hours and five minutes. They reported at 2:20 P. M. to go to work and worked from 2:20 P. M. to 12:40 A. M., December 22, 1912.

Q. (By Counsel for Defendant.) And how long were they on duty, counting out the two hours and twenty-five minutes and the one hour's time they were relieved at Bowie?

To which question counsel for the Government objected on the ground that the same called for a conclusion of law, which objection was sustained by the Court and to which ruling of the Court in sustaining said objection the defendant, by its counsel, then and there duly excepted.

From 5:30 A. M., when the men were considered on duty at Lordsburg, until they were finally relieved, counting out the two hours and twenty-five minutes and the one hour's time they were relieved at Bowie, would be fifteen hours and forty-five minutes, and in that fifteen hours and forty-five minutes is included the time that they were on duty at Bowie from 11:40 to 1:20 P. M., one hour and forty minutes.

Q. (By Counsel for Defendant.) What did you, as chief dispatcher for this company on this division, and the other officers of the company do, as far as you know of your own knowledge, in this particular case mentioned in this complaint as to complying with this law?

(Testimony of William Wilson.)

Which question was objected to by counsel for the Government as incompetent, irrelevant and immaterial and not tending to prove any issue in the case, which objection was sustained by the Court, and to which ruling of the Court defendant, by its counsel, then and there duly excepted. [36]

By the COURT.—I want it understood that you may introduce testimony as to what was done in this particular case, that is, you may prove the facts connected with this particular case—what this witness did or any other man did with reference to this particular train.

I issued instructions that the train crew be released from 9:15 A. M. to 11:40 A. M. and from 1:20 P. M. to 2:20 P. M., and I issued instructions that the engine crew be released from 1:30 P. M. to 2:30 P. M. that I may use that time to get them as near to Benson as possible; that I may consider the period they were released as being off duty. Mr. Eaker's engine did not bring the train into Bowie. Mr. Eaker with his regular engine was helping another train from San Simon to Steins, and returned from Steins to Bowie arriving at Bowie at 1:30 P. M., and was released from 1:30 P. M. to 2:30 P. M., one hour. When Mr. Eaker and his fireman arrived at Bowie at 1:30 he was released. He was not required to perform any duty for the company from that time until two-thirty P. M. When the train crew was released at 9:15 A. M. until 11:40 A. M., at Bowie, they were not required to perform any duty whatever for the company during the two hours and twenty-five min-

(Testimony of William Wilson.)

utes. They were not required to do anything for the company either during all the time from 11:40 to 1:20 P. M., while they were on duty. They were not required to do anything for the company from 1:20 P. M. to 2:20 P. M. They could go and come and do as they chose. Their time was their own. They were not waiting around expecting to be called and to go on duty during the periods of time they were released. That applied to both periods as to the train crew, from 9:15 A. M. to 11:40 A. M., and from 1:20 P. M. to 2:20 P. M. When this train reached Simon Mr. Eaker and Mr. Kempf took their engine and turned around and went back to Steins helping another train up the hill. They then came back to [37] Bowie and caught up with their train there. The train was pulled in from Simon to Bowie by another engine. When Mr. Eaker and Mr. Kempf got back to Bowie with their regular engine they took the train with it. I stopped Mr. Eaker and Mr. Kempf before they got to the end of their run on account of the sixteen hour law and relieved them at 10:29 P. M., at Cochise Station. Cochise is not a terminal and was not the terminal for that train and was not the end of the run for that train. I relieved them at that place at 10:29 P. M. to comply with the sixteen hour law and to keep them from working longer than sixteen consecutive hours. In order to get the train into Benson to the end of this run it was necessary to deadhead another engine crew from Benson to Cochise, to relieve Engineer Eaker and Fireman Kempf. Neither Mr. Eaker nor Mr. Kempf

(Testimony of William Wilson.)

performed any duty whatever for the company after 10:29 P. M. that night. They deadheaded from Cochise into Benson. I have been to Bowie. They were relieved at Bowie and remained there and could have obtained food and rest and recreation, at least I have gotten them there myself.

Q. (By Counsel for Defendant.) Is two hours and twenty-five minutes sufficient time for rest and recreation?

To which question the Government, by its counsel, objected, which objection was sustained by the Court, and to which ruling of the Court in sustaining said objection defendant, by its counsel, then and there duly excepted.

Q. (By Counsel for Defendant.) Was the one hour that the train crew was released from 1:20 P. M. to 2:20 P. M., and the one hour that the engine crew was released from 1:30 P. M. to 2:30 P. M., sufficient for these men at that time and place for rest?

A. Yes, sir. [38]

To which question and answer the Government, by its counsel, objected, which objection was sustained by the Court and the answer excluded from the consideration of the jury, to which ruling by the Court the defendant, by its counsel, then and there duly excepted.

The engineer and fireman were not relieved by me from 1:30 P. M. to 2:30 P. M. to eat. My instructions were not to that effect. Neither were the conductor and brakemen relieved for that purpose.

Q. (By Counsel for Defendant.) Mr. Wilson,

(Testimony of William Wilson.)

was Billy F. Eaker on duty for a longer period than sixteen consecutive hours on December 21st, 1912, as alleged in the complaint, from 5:30 o'clock A. M. to 10:29 o'clock P. M. of that day?

To which question the Government, by its counsel, then and there objected, which objection was sustained by the Court, and to which ruling of the Court defendant, by its counsel, then and there duly excepted.

By the COURT.—You may show the fact but his statement would be a conclusion and the objection will be sustained.

To which ruling of the Court defendant, by its counsel, then and there excepted on the record.

By Mr. HARTMAN (Counsel for Defendant).—We desire to ask the same question of the witness for the record as to each of the six counts.

By the COURT.—Very well, let the record show that you have asked that question.

By Mr. LIST (Counsel for the Government).—And the same objection.

By the COURT.—The same objection noted and the same ruling.

By Mr. HARTMAN.—And an exception. [39]

Redirect Examination.

(By Mr. LIST.)

The release of one hour was not given to the engine crew and train crew for the purpose of allowing them to eat. It was given for the purpose so it could be used as being off duty and working them to get them nearer to Benson. I cannot state now what the con-

(Testimony of William Wilson.)

ditions were in the yard at Bowie or in the roundhouse as to necessitate giving that release of one hour. I could not refer to any records which I have to ascertain that information. The agent at Bowie possibly would have such records. I sent these release messages or authorized the messages sent. So far as I can recall it was on account of conditions. It was not known exactly when we could get them out. The train did not leave Bowie until six P. M. They were there switching around and meeting other trains. The reason the first release was given to the train crew for two hours and twenty-five minutes was, at that time it looked as though the engine would be back to Bowie and start work about 11:40. The message was addressed to the roundhouse foreman and to the agent at Bowie. That message did not tell them any definite period to release the crew. It simply said, "Release them." I don't know just what the conditions were to make the release just 2 hours and 25 minutes, from 9:15 to 11:40 A. M. these men were not under any responsibility at all. I don't know where they went or what they did, only they must have remained at Bowie. If the release was definite from 9:15 A. M. to 11:40 A. M., they would report again at 11:40 A. M. without being called. From 11:40 until the next release went into effect the men were still at Bowie under instructions from me, but they were not working. I could not say whether or not they reported at 11:40 A. M. When the train is in the yard limits the agent has charge of matters of that kind. There is also a [40] company

(Testimony of William Wilson.)

watchman to look after the train. If the men were not released for a definite period and had to be called to go on duty again the agent would have the yard clerk call them. He would simply have to hunt them. There is no way for them to get out of town; they would have to stay in Bowie. They didn't know when they were released how long they would be at Bowie. At the time the last release of the whole train crew for one hour a local freight train going east arrived at Bowie at 2:15 P. M. They (the train crew released) couldn't have gotten out; they would have to stay there to meet every train so far as that train was concerned. They did all their work switching in the yard after 2:30 P. M. I can't say why they did not do it between 1:20 and 2:20; possibly the engine might not have been ready. When their engine got in there to Bowie, as a rule they took oil and water and sometimes the roundhouse foreman will do a small job on the engine, but in this case I can't say what work there was to do on the engine. The local crews and probably other train crews on the slow train had lunch at Bowie and also at one or two other places, but I cannot say whether these men had their lunch there at that time. Sometimes the men carry their lunches with them in the caboose. In this case I would say that these men lived in Benson. If conditions had been normal at Bowie at that time this release would not have been given. The release was given to cover the delays which we saw would be encountered there at Bowie. They had a lot of switching to do.

(Testimony of William Wilson.)

Recross-examination.

(By Mr. HARTMAN.)

The engine crew were deadheaded from Benson to Cochise to relieve Eaker and Kempf. This train didn't leave Bowie on that day until 6:00 P. M. After 2:30 P. M. they were switching and making up their train, which was a part of their duty, and to load and unload freight along the road.

Redirect Examination.

(By Mr. LIST.)

The engine crew which was deadheaded from Benson to Cochise took this same engine at Cochise. As well as I remember they went over on passenger train No. 8. Ordinarily that train [41] arrived at Cochise, at 10:15 P. M. I don't know what time Extra West, Engine 2813, passed Cochise because the office at that place was closed at night. It is the duty of the train dispatcher when he gives a release to note the same on the train sheet when he gets a message from the parties who have been released. He writes it on the train sheet when he gets a message from them. We always try to get a message from them for the record. If I had wanted these men at Bowie to go to work before the two hours and twenty-five minutes was up I would have instructed the agent to call them. There is an address book of all trains and engine-men at Tucson and at all other places where they go off duty. When they are wanted they are called provided they have had their rest. At other places ordinarily they are in the caboose. There was no address book at Bowie. In case they

(Testimony of William Wilson.)

were wanted it would have been necessary to send out and notify them. I could not have cancelled that release until I had gotten the word to the men. If I had found we wanted them at ten o'clock I had a right to call them, but I didn't need them.

Examination by the Court.

I cannot state just what the cause of the delay was at that time at Bowie, but Bowie is quite an important interchange point, especially in the winter time, and becomes congested; that is, a great many trains pass through there and there may be not enough engines to handle them, and the helper engine may have other work so that we would have to take one of these crews to handle some freight train. As well as I remember, it was owing to the condition of the yards and the weather that required the trains to stay there so long. The only records we have is the delay reports.

Recross-examination. [42]

(By Mr. HARTMAN.)

"During the two hours and twenty-five minutes this train crew was relieved at Bowie from 9:15 A. M. to 11:40 A. M., they were not waiting around expecting to be called or to have the release changed on them. In case it had become necessary for any good reason and occasion demanded it to have changed the period of release and we had called these men to go to work before 11:40 A. M., I would have had to issue instructions to the agent as to what time I wanted them and he would have endeavored to get them, and if he had not been able to get them

(Testimony of William Wilson.)

started to work at the time specified he would then have advised me. If the agent could not have found the men the call would have had to have been changed and the men would have been subject to no reprimand on that account. They had a right to go out into the country if they wanted to, as long as they showed up at 11:40 A. M., and I had no right to change the time of the release on them unless I could get hold of them.”

[Testimony of B. T. Sullivan, for Plaintiff.]

B. T. SULLIVAN, being first duly sworn, testified on behalf of the plaintiff as follows:

Direct Examination.

(By Mr. LIST.)

“My name is B. T. Sullivan and I am an employee of the Southern Pacific Company and have been so employed about three years. I have been running from Lordsburg to Benson on the regular freight run. I was conductor of Extra West, Engine 2813, on December 21st, 1912. I have a record of the trip and also have a recollection of the particular trip. I made a record in my train book at the time I was released at Bowie and I turned in the records at the time to the company at the time. [43] I made out a time slip for the trip and turned in a delay report.

(Witness identifies document handed him by counsel for the Government.)

That is my time slip or report I made for that trip.

(The document referred to was offered in evidence and admitted and marked Government's Exhibit

(Testimony of B. T. Sullivan.)

“C,” and is hereinafter fully set forth.)

(Witness identifies another document handed him by counsel for the Government.)

“That is the delay report of that trip, December 21, 1912.”

(The document so identified by the witness was offered in evidence by the plaintiff and admitted and marked, Defendant’s Exhibit “D,” and is hereinafter fully set forth.)

“I made this delay report myself. Refreshing my recollection from this report, I was called to leave Lordsburg at 6:00 A. M., and left there at 6:00 A. M., arriving at Bowie at 9:15 A. M., was released at Bowie at 9:15 A. M. to 11:40 A. M., two hours and twenty-five minutes; was released at Bowie at 1:20 P. M. to go to work at 2:20 P. M. and was off duty.

By Mr. LIST (Attorney for the Government.)—I move that that be stricken from the record, that he was one hour off duty.

By Mr. HARTMAN (Counsel for Defendant).—I object; he knows whether he was off duty or not.

The COURT.—The objection is sustained and the witness’ statement that he was off duty, Gentlemen, is excluded, that is a question of law to be decided from the evidence.

“I was sitting around Bowie, sitting around reading during this time, and from 2:20 on I got my train together and got ready to leave town. The delay report shows a number of delays there. Delay by other trains. Letting passenger [44] trains by, waiting for another engine five hours and fifteen

(Testimony of B. T. Sullivan.)

minutes, taking water, lunch, blocked by other trains so we could not get out. We were blocked by these other trains after we went to work. We were blocked after we went to work, after 2:20 and were delayed from 2:20 P. M. to 6:00 P. M. by these various causes. I don't remember what prevented us from getting out at 1:30 when engine 2813 got back. I don't know why the release from 1:20 P. M. to 2:20 P. M. was given us. The operator gave us the release. The operator said you are released for one hour. The operator did not say why. We could not have gotten out of the yard at 1:30 because we were blocked. The operator also gave us the release of two hours and twenty-five minutes, which was verbal. The operator told me I was released until 11:40 A. M. If I remember right, he didn't say released until called; he said released until 11:40 A. M. When the release was given us from 9:15 to 11:40 they are supposed to call us after the time of the release and we are off until we are called. From 9:15 to 11:40 I was around the hotel there reading and the brakemen were in the caboose and around the hotel and sitting under the trees. We were released that morning according to my train book for that length of time. The train book shows released at Bowie at 9:15 A. M., called to go to work at 11:40 A. M. They called us at 11:40 A. M. to go to work as soon as we can after that. According to my train book we went off duty at 9:15 A. M. I didn't know when I was going to be called.

(Testimony of B. T. Sullivan.)

Cross-examination.

(By Mr. HARTMAN.)

I was not doing anything during the two hours and twenty-five minutes, only just staying around the hotel. I didn't perform [45] any duty for the company during that time. I knew when I was released at 9:15 that I would not have to go back to work until 11:40 A. M., and during that time I could do as I pleased. I could have gotten into an automobile and gone out in the country and got back at 11:40 and would have been in the clear and so would the brakemen. I had a right to go and come as I chose—we were free. Our time was absolutely our own from 9:15 A. M. until 11:40 A. M., and that applied to the brakemen too. From 1:20 P. M. to 2:20 P. M. we were relieved for one hour. We had to be back after that one hour, and when we were relieved at 1:20 we knew we did not have to go back to work until 2:20 P. M. We were not waiting around expecting to go to work during that period. Our time was absolutely our own during that time. That applied to the brakemen too, and we do as we like. We were free to come and go as long as we were back at 2:20, and we were not working for the company during that time and neither were the brakemen. Our regular engine was used to help a train from Simon to Steins. I think it is about thirty miles from Steins to Bowie. Mr. Eaker and Mr. Kempf were running that engine. I knew that we could not go out until that engine came back. I think that engine got back at 1:20 P. M. and that is

(Testimony of B. T. Sullivan.)

when they released us again. This train which I had was the regular local between Lordsburg and Benson. The regular run was from Lordsburg to Benson and the termini for that train were Lordsburg and Benson. When we left Lordsburg we expected to go to Benson that day. Mr. Kempf and Mr. Eaker, the engineer and fireman, didn't go all the way through. They stopped at Cochise at 10:29 P. M. because their sixteen hours was up. We (the train crew) had plenty of time to go on to Benson and we had got another engineer [46] and fireman at Cochise. They came from Benson. The company did not have any extra engineers and fireman at Cochise—had to send them out from Benson. They used the same engine to pull the train into Benson.

Examination by the COURT.

The conductor turns in a report showing the cause of delay. We were delayed at Bowie five hours and fifteen minutes waiting for the engine, twenty minutes for number nine, ten minutes for number ten, two hours switching, forty minutes blocked by number thirty-two, thirty minutes by extra 2759, and twenty minutes blocked by passenger train.

(Witness here identifies document handed him by counsel for defendant marked Exhibit No. 6 for Identification.)

This is the telegram sent by me to Mr. Wilson, chief dispatcher at Tucson.

(Witness also identifies another document marked for identification, Defendant's Exhibit No. 7.)

(Testimony of B. T. Sullivan.)

This is a message I received from Mr. Wilson to which I sent one in reply. I received this message from Mr. Wilson at Willcox, after we left Bowie. On that run with that local freight train we would ordinarily get out of Bowie in an hour and a half, sometimes in an hour, sometimes longer. We have to do switching, loading and unloading. After our engine returned to Bowie it had to be taken to the roundhouse.

Redirect Examination.

(By Mr. LIST.)

When this release was given at 9:15 it stated that we were to be off duty until 11:40. Until our engine got back. We could not tell how long we would be off. I was figuring we could get in was the reason I didn't send the message to the dispatcher until after we left Bowie. The reason I didn't [47] wire him at Bowie is because the Dispatcher knew we was off at Bowie. We generally called his attention to it. It was not necessary to wire the dispatcher from Bowie. I had no occasion to wire the dispatcher from Bowie. I did not receive any message at Bowie that I was released; the operator told me. I would be off duty till called.

(Witness reads from train book at the request of counsel for plaintiff:) "Released 9:15 A. M., called to work 11:40 A. M.; released 1:20 to go to work at 2:20."

When we are released at 9:15 to go to work at 11:40 it is the custom to call us at 11:40 whether the release is for a definite or indefinite period.

(Testimony of B. T. Sullivan.)

Examination by the COURT.

I stated I was released at Bowie at 9:15 and called to go to work at 11:40. I am referring to my train book which states that the release—that I was released at 9:15 and called to go to work at 11:40. My understanding was that I was released until 11:40. I was released at 9:15 until 11:40. The operator said that to me when he released me.

Redirect Examination.

(By Mr. LIST.)

My home at that time was at Benson as well as the other members of the train crew, also the engineer and fireman.

Recross-examination.

(By Mr. HARTMAN.)

There is a hotel at Bowie, a store, restaurant, reading-room, newsstand and billiard-room. There is a hotel at the depot where we can get sleeping accommodations.

[Testimony of B. F. Eaker, for Plaintiff.]

B. F. EAKER, being first duly sworn, testified on behalf of the plaintiff as follows: [48]

Direct Examination.

(By Mr. LIST.)

My name is B. F. Eaker. I am a locomotive engineer and have been since 1906. In December, 1912, I was running on the Southern Pacific on the Benson to Lordsburg local. I was the engineer on Extra West, Engine 2813, on December 21, 1912. I made

(Testimony of B. F. Eaker.)

out a time slip on that trip.

(Witness identified a document handed him by plaintiff's counsel.)

This is my time slip for that trip which I turned in to the company.

(Document referred to offered in evidence by the plaintiff, admitted and marked Government's Exhibit "E," and is hereinafter fully set forth.)

Referring to this time slip I came out of Lordsburg on this trip on engine 2813 to San Simon, from San Simon back to Stein's and ran light from Steins to Bowie. I got back to Bowie at 1:20 P. M. When I got back I ate dinner and purchased a cigar and smoked and then went out on the platform and went to sleep. Myself and my fireman ate dinner as soon as we got back. There was a release given us. I don't remember who gave it to us. I don't think he said anything to me. He gave me a message releasing the engineer and fireman for at least one hour. Someone came out on the platform and waked me up and told me we were going to work at 2:30 and we went back to our engine. From that time on we were switching in the yard at Bowie for a number of hours and we were released at 10:29 P. M. at Cochise. Mr. Kempf was my fireman during this time.

Cross-examination.

(By Mr. HARTMAN.) [49]

Myself and Mr. Kempf left Lordsburg with our engine on that train and arrived at Bowie at 1:20

(Testimony of B. F. Eaker.)

P. M. We stopped with the engine before we got to Bowie at San Simon. Our engine was the regular engine for that train. We were supposed to take that train clear through to Benson with that engine. When we got into Bowie at 1:30 we received this message relieving us for one hour and when we received this message we knew that we would not have to go to work until that hour expired. During that time we were not expected to go to work. We could do what we pleased during that hour and we did do what we pleased. The hour was absolutely ours and we were not to perform any duty for the company during that time. I ate lunch, smoked a cigar and laid down and took a nap and got rested and someone woke me up and we went and got on our engine and went to work, switched around the yard awhile and then went to Benson. Our time was up at Cochise at 10:30 P. M., and we were relieved there at Cochise at 10:29 P. M. We quit work right there at Cochise and did not work any longer on that trip. Another engineer and fireman, Engineer Wilson and Fireman Houston, deadheaded out from Benson to Cochise and relieved us at Cochise. They were on our engine ten or fifteen minutes before our time was up waiting to relieve me. They got on our engine ten or fifteen minutes before our time was up. At 10:29 I climbed down off the engine and went back into the caboose of the train and went to bed and deadheaded on that train into Benson, and the fireman also. Neither of us worked any more after 10:29 on that trip.

(Testimony of B. F. Eaker.)

Q. (By Counsel for Defendant.) Were either you or your fireman required or permitted to be on duty or remain for a longer period than sixteen consecutive hours, to wit, from 5:30 o'clock A. M. on the 21st day of December, to 10:29 o'clock [50] P. M. on said day, as referred to in plaintiff's complaint?

By Mr. LIST.—Same objection—incompetent.

By the COURT.—The objection is sustained. It is a question for the Court and not for the witness.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Redirect Examination.

(By Mr. LIST.)

At 10:29 P. M. I went back to the caboose and went to bed. On this run we were all along the road switching and would sometimes eat lunch at Willcox and sometimes at Bowie. There was a regular eating house at Bowie.

WHEREUPON, the Government rested its case, and the defendant, to sustain the issues on its part, offered the following evidence:

[Testimony of J. E. Lovejoy, for Defendant.]

J. E. LOVEJOY, called as a witness on behalf of defendant and first duly sworn, testified as follows:

Direct Examination.

(By Mr. HARTMAN.)

I am chief clerk to the superintendent of the Southern Pacific Company at Tucson. I occupied the same position on December 21st, 1912. I have been in the railroad business for twenty-five years.

(Testimony of J. E. Lovejoy.)

(Witness is shown Government's Exhibit "C.")

This is a trip report made out by Mr. Sullivan. I have had considerable experience in handling the time of men and paying them. This is a standard form of conductor's trip report that we require the conductors to turn in covering each trip that they make, and it gives the time put in for the purpose of determining the amount of money due employees for the services performed. I know how conductors and [51] brakemen are paid. Am thoroughly familiar with the schedule under which they are paid.

By Mr. LIST (Counsel for the Government).—The reason we introduce the time slip is there are some notations on these slips. We admit that the time slip does not indicate the actual hours of service. It was not introduced for the purpose of showing that they were actually on duty more than sixteen hours—not for that purpose.

(Witness is shown defendant's exhibit heretofore marked for identification No. 3.)

This is bulletin No. 1729, signed and issued by W. H. Whalen. Mr. Whalen at that time was the Superintendent of the Tucson Division of the Southern Pacific Company.

Defendant thereupon offered in evidence the said exhibit marked for identification Defendant's Exhibit No. 3, and which is hereinafter fully set forth, to which offer the plaintiff, by its counsel, objected on the ground that the same was incompetent, which objection was sustained by the Court, and to which

(Testimony of J. E. Lovejoy.)

ruling of the Court defendant, by its counsel, then and there duly excepted.

Defendant, by its counsel, offered in evidence that certain exhibit heretofore marked for identification Defendant's Exhibit No. 4, which is hereinafter fully set forth, to which offer plaintiff, by its counsel, objected on the ground that the same was incompetent, which objection was sustained by the Court, and to which ruling of the Court defendant then and there duly excepted on the record.

Defendant thereupon offered in evidence a certain document heretofore marked for identification Defendant's Exhibit 7, and in connection therewith another document heretofore marked for identification Defendant's Exhibit 6, which documents [52] were admitted in evidence and are hereinafter fully set forth.

Defendant offered in evidence a certain document heretofore marked for identification Defendant's Exhibit No. 5, which is hereinafter fully set forth, which offer was objected to as incompetent by plaintiff and which objection was sustained by the Court and to which ruling of the Court the defendant then and there by its counsel duly excepted.

WHEREUPON, both parties rested, and the foregoing, including the exhibits as set forth herein, constitutes all the testimony and evidence in the case.

Thereupon, and before the Court charged the jury and before argument, plaintiff moved the Court that it direct the jury to return a verdict in its favor upon

the first and second causes of action set forth in the complaint, and that the Court direct the jury to return a verdict in its favor upon the third, fourth, fifth, and sixth causes of action set forth in the complaint.

Thereupon, and before argument and before the Court charged the jury, defendant, by its counsel moved the Court to direct the jury to return a verdict in its favor upon the first, second, third, fourth, fifth and sixth causes of action as set forth in the complaint, and that in case said motion be denied that it have leave to go to the jury.

Thereupon, after argument by the respective counsel in the absence of the jury the Court granted plaintiff's said motion for a directed verdict in favor of plaintiff upon the first, second, third, fourth, fifth and sixth causes of action, and denied defendant's motion for a directed verdict in favor of defendant on the said first, second, third, fourth, fifth and sixth causes of action and for leave to [53] go to the jury.

Defendant then and there and before the Court charged the jury duly excepted to the ruling of the Court in granting plaintiff's said motion for a directed verdict in favor of plaintiff, and duly excepted to the ruling of the Court in denying defendant's said motion for a directed verdict in its favor and for leave to go to the jury in case said motion be denied.

Thereupon the Court charged the jury as follows:

[Instructions.]

“In this action the United States seeks to recover from the defendant penalties for certain violations of said act, part of which has just been read to you. The Government’s complaint is in six counts. The first two relate to the engineer and fireman of defendant’s freight train Extra West 2813, running between Lordsburg, New Mexico, and Benson, Arizona. Counts three to six, inclusive, relate to the conductor and brakemen of the same train, being seventeen hours and fifty-nine minutes, and the continuous service required of the conductor was nineteen hours and ten minutes.

“The defendant has alleged in its answer that in neither case were the employees in question on duty more than sixteen consecutive hours, but that in each case were definitely released from duty in connection with said train at Bowie for a period of two hours and twenty-five minutes, to wit, from 9:15 A. M. December 21st, 1912, to 11:40 A. M. of the same day, and were again definitely released from service in connection with said train at the same place for one hour, from 1:20 P. M. until 2:20 P. M. of the same day. Defendant contends that these releases operated to break the continuity of the employees’ service and therefore that the employees were not on duty more than sixteen consecutive hours. The [54] Government has filed a request that the Court instruct the jury to find for the plaintiff on the first, second, third, fourth, fifth and sixth

causes of action. All other causes were disposed of by the Court.

The defendant has also filed a motion for a directed verdict and asked the Court to direct a verdict in its favor on said first, second, third, fourth, fifth and sixth causes of action in plaintiff's complaint herein.

Under the law as I understand it and on the undisputed testimony in this case, including the telegram sent by the trainmaster, Mr. Wilson, to the agent at Bowie, I deem it my duty to grant the request made by the Government and direct you to find for the plaintiff on the first, second, third, fourth, fifth and sixth causes of action of plaintiff's complaint. I deny the motion and request made by the defendant and therefore you will, without retiring, sign and record your verdict."

To which said portion of said charge as follows: "Under the law as I understand it and on the undisputed testimony in this case, including the telegram sent by the trainmaster, Mr. Wilson, to the agent at Bowie, I deem it my duty to grant the request made by the Government and direct you to find for the plaintiff on the first, second, third, fourth, fifth and sixth causes of action of plaintiff's complaint. I deny the motion and request made by the defendant and therefore, you will, without retiring, sign and record your verdict," the defendant, by its counsel, then and there duly excepted. [55]

**[Plaintiff's Exhibit "A"—Telegram, December
21, 1912.]**

Form 2191.

Telegram

Sent to	Time Sent	Sender	Receiver
Bo	9 AM	G	RM
Tucson DEC 21st 12/			

WHL and Round house foreman Bowie

as you have to use the local eng there will be no eng for local crews to work with release the local crews and call for when can give them an eng advise time released and recalled see it is as much as an hour so we can get credit for it.

WW 9am

Plf. Exhibit "A." [56]

**[Plaintiff's Exhibit "B"—Telegram, December
21, 1912.]**

Form 2191.

Telegram

Received From	Time Received	Receiver
Bo	150 PM	G
Bowie, 12/21/1912		

W W

Ext. 2813 West was released at Bowie at 915 AM
Called to go to work at 1140 AM Released at 120 PM to go work at 220 PM.

Sullivan Condr 2813 W

Plf. Exhibit "B." [57]

[Plaintiff's Exhibit "C"—Conductor's Trip Report.]

Plf. Ex. "C."

Form 2631.

C. S.

Report No. 6.

CONDUCTOR'S TRIP REPORT.

Southern District, Tucson Division

Engines.	Engineers.	Class of Service.
2813	Eaker	Local
Train No.	From.	To.
+	B 1148	B-1033
		Miles Run.
		115
		Total Card Mileage————

Called to leave at 6 00 A. M. 12-21 1912.

Left at 6 00 A. M. 12-21 1912.

Arrived at 12 25 A. M. 12-22 1912.

Released at 12 40 A. M. 12-22 1912.

Time on Road 15 Hours—Mins.

Total Time in Service 18 Hours 55 Mins.

Schedule Time 10 Hours Mins.

Terminal Delay Hours Mins.

Doubling Hills Hours Mins.

Claim 15 Mins. Switching in Benson Yard.

Time Claimed.

	Names.	Days.	Miles or Trips.	Over Hours.
Conductor	B. T. Sullivan	1		8
Brakeman	W. E. Brown	1		8
"	H. F. Peacock	1		8
"	C. G. Harrison	1		8
Baggageman or Porter				

Time slip Condr. Sullivan 2813.

[Reverse side:]

SUMMARY OF DELAYS.

	Hrs.	Mins.
Local Work and Switching.....		
Handling Company Material.....		
Meeting Trains		
Wait Connections		
Fuel and Water.....		
Derailments and Wrecks.....		
Engine Failures		
Yards Blocked		
Trains Not Ready.....		
Engines Not Ready.....		
Trains Parting		
Hot Box and Repairs.....		
Air Failures		
Bridges		
Car Inspections		
Block Signals		

[Written across face of above:] P. G. 6/12/13 S. C. C.

REMARKS.

Released at Bowie at 9 15 A. M. called to go to work at 11 40
 A. M. released at 1 20 P. to 2 20 P. M. off duty 3 hrs. 25 mins.
 at Bowie waiting for engine. [58]

[Plaintiff's Exhibit "D"—Train Delay Report.]

Form 2370

TRAIN DELAY REPORT

COMPANY

Tucson Division Superintendent.

Ex West { Engine No. _____
Train No. — { Engine No. _____ Direction — From — To —

Ordered for 6:00 A. M. Made up at _____ M. Engines on at _____ M.
Air Ready at _____ M. Train Departed at 6:00 A. M. Arrived Destination at _____ M.

Name of Employee.	Occu- pation.	Reported for Duty.	Went off Duty.	Total Time on Duty.	Time off Duty Prior to this Trip.
		Date.	Time.	Date.	Time.

DETAIL OF DELAYS

Delayed at or Between.	Hours.	Minutes.	Cause of Delay.
Steins		5	Way Frt. & Air
Vanar		10	Inspection & No. 4.
		20	10 5 15
Simon		50	Way Frt. Switching Water Ex. 2742
			5 hrs. 15 mins.
Bowie	9	15	Engine taken away to help trains another engine at 2:30
			At 9:15 A. M. No. 9-10 No. 10-10 Water 5
			2 hrs. 5 40
			Switching Weighing Blocked by No. 32
			2759 West and 20 mins.
			Blocked by Ex. 30 mins. A. E. Pass
			5 15 40 15
Willcox	1	15	Water Switching Way Frt. Filling Water Cars
Hado		5	Setg. out car
			10 25 No. 8 10
Cochise		45	Ex. 2779 East Pickg. up and setg. out cars
			15 10
Dragoon		25	Way Frt. Setg. out cars
Sibyl		5	Inspection
			Released at Bowie 3 hrs. 25 mins.
			Arrived at Benson 12-22-12 12:25 P. M.
Total	12	55	

Cause of delay must be fully stated.

(See instructions on back.)

Sullivan 2813 Delay Report.

59]

B. T. Sullivan, Conductor.

Eaker, Engineer, Engine No. 2813.

Engineer, Engine No. _____

[Plaintiff's Exhibit "E"—Engineer's Trip Report.]

Plf. Ex. "E."

#

Form 2301.

ENGINEER'S TRIP REPORT No. 18.

Engine.

Train.

2749

XE2742

No. 813 Initial S. P. No. X2813 Class Frt. and Helper
 From Lordsburg to Simon, Simon to Steins, Steins to Benson.

Called for 6 A. M. 1912

Left at 6 A. M. 12/21 1912.

10 29 25

Arrived at 12 40 A. M. 12/22 1912.

Relieved at 12 40 A. M. 1912.

16 29

Time on Road 18 Hrs. 40 Mins.

This space is for the
Timekeeper's Notes.

97

Schedule Time 11 Hrs. 40 Mins.

114+31

Time Card Mileage 146

5

Road Mileage 146

Over Miles 92

Initial Delay — Hrs. — Min.

Terminal Delay — Hrs. — Min.

Total Claim.

Miles 233½ Days 1 Trips 2 Hrs. 18-40

Engineer Billy F. Eaker.

Fireman Frank H. Kempf.

Conductor Sullivan.

Watchman.....

NOTE.—Read Instructions on back of report.

Time slip Engr. Eaker 2813. [60]

REMARKS.

X W 2813 Lordsburg to Simon.

Help X E. 2742 Simon to Steins.

X W 2749 Steins to Bowie E X W 2813

Bowie Benson.

Released at Bowie 1 hr. Released at Cochise at 10 29 P. M. on acct. 16 hrs. while train was moving. Claim continuous time from 6 A. M. to 12 40 A. M. or 18 hrs. and 40 mins.

P. G. 6/12/13. S. C. C.

Defendant's Exhibit No. 3, for Identification
[Bulletin No. 1727].

Rejected and filed May 22, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy.

“BULLETIN NO. 1727.

“TO TRAIN AND ENGINE MEN:

February 11, 1910.

There is a lack of understanding as to the interpretation of the Federal Law relative to excessive service and under what conditions a train may proceed to its terminal when the service will exceed sixteen hours. The law provides that under certain conditions due to casualties or causes which could not have been foreseen at the time of leaving terminal, the law will not apply and it is possible for train to proceed to its terminal destination. Hereafter the following will apply: Be careful in giving delays, to state all causes particularly such as break in twos and any defects in engine which might have caused delay and if you receive a message over my signature that the law will not apply in your case, giving the reason therefor, and stating that you may pro-

ceed to terminal, be governed accordingly; otherwise you will see that you do not perform any service in excess of sixteen hours, this sixteen hours to include the thirty minutes prior to time called to leave your initial terminal. You will, however, use every effort to protect the company's interest by asking for instructions and giving full information as to delays which might constitute the reason for the law becoming inoperative, in ample time to permit the receipt of instructions referred to. Conductors in wiring delays which involve any defects of engine must have message signed jointly by the engineer to avoid any misunderstanding which might result in violation of the law.

W. H. WHALEN,
Superintendent." [61]

Defendant's Exhibit No. 4, for Identification
[Bulletin No. —].

Rejected and filed.

BULLETIN NO.

August 16, 1912.

TO TRAIN AND ENGINE MEN:

There is a lack of understanding as to the Federal Law relative to excessive service and under what conditions a train may proceed to its terminal when the service will exceed sixteen hour. The law provides that under certain conditions due to casualties or causes which could not have been foreseen at the time of leaving terminal, the law will not apply and it is permissible for train to proceed to its terminal destination. Hereafter the following will apply: Be careful in giving delays to state all causes, par-

ticularly such as break in twos and any defects in engine which might have caused delay and if you receive a message over my signature that the law will not apply in your case, giving the reason therefor, and stating that you may proceed to terminal, be governed accordingly; otherwise you will see that you do not perform any service in excess of sixteen hours, this sixteen hours to include the thirty minutes prior to time called to leave your initial terminal. You will, however, use every effort to protect the company's interest by asking for instructions and giving full information as to delays which might constitute the reason for the law being inoperative, in ample time to permit the receipt of instructions referred to. Conductors in wiring delays which involve any defects of engine must have message signed jointly by the engineer to avoid any misunderstanding which might result in violation of the law.

J. H. DYER,
Superintendent. [62]

Defendant's Exhibit No. 5, for Identification [Letter, May 17, 1910, G. L. Hickey to P. Slater et al.].

Rejected and filed May 22d, 1914. George W. Lewis, Clerk. By Effie D. Botts, Deputy.

“Tucson, Ariz., May 17th, 1910.

Mr. P. Slater,
Trainmaster—YUMA.

Mr. C. M. Murphy,
Trainmaster—LORDSBURG.

Mr. B. F. Scarborough,

Chf. Dispr.—TUCSON.

Mr. M. J. Kingsbury,

Term. T. M.—GILA.

Gentlemen:

We are in receipt of rulings from the General Manager that in view of the frequent violations of the 16-hour law that hereafter employees responsible for authorizing such violations will be discharged from the service.

Mr. Scarborough is in possession of all the rulings bearing on this subject, and the matter will be taken up with a view of having rulings up to date prepared and furnished us for distribution. In the meantime I would request that Trainmasters and Terminal Trainmaster take no chances whatever by authorizing service in excess of 16 hours. Mr. Kingsbury will be very particular to not permit any trainmen to do switching in Gila yard which in any possibility would call for violation of the hours of service law.

Yours truly,

(Sgnd.) G. L. HICKEY,

Asst. Supt.

GLH-J. [63]

[Defendant's Exhibit No. 6—Telegram, December 21, 1912.]

Form 2191.

Telegram

Recd From Time Received

OX

825 PM

Willcox 12—21—1912.

W W

Train crew 16 hrs is up at 12 55 AM eng crew 16

hrs up at 10 30 PM eng crew was released 1 hour at Bowie.

SULLIVAN.

Defendant's Exhibit No. 6. [64]

[Defendant's Exhibit No. 7—Telegram, December 21, 1912.]

Tucson Dec 21st 1912.

Sullivan Willcox

Your wire When do you figure the train crews time up and When the engine crews time up?

Does the release mentioned in message from Bowie apply also to eng crew or only train crew?

There is an eng crew on ex 2778 east Clark See that you get it.

Cut out enough work so that you can reach Benson at the time your time is up which I figure is 12.55 A.M. according to your message Answer

W W

Defendant's Exhibit No. 7 [65]

AND THEREAFTER, counsel for the respective parties made and entered into the following stipulation:

In the United States District Court for the District of Arizona.

No. 5—TUCSON.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

**Stipulation [Extending Time to Serve, etc.,
Proposed Bill of Exceptions].**

It is hereby stipulated by and between the parties hereto, by their respective counsel, that the defendant herein be allowed thirty days' additional time from date hereof in which to serve and file its proposed bill of exceptions relating to the judgment entered herein on counts one to six, inclusive, of plaintiff's complaint.

Dated June 25th, 1914.

(Sgd.) THOMAS A. FLYNN,
SAMUEL L. PATTEE,
Attorneys for Plaintiff.

FRANK COX,
FRANCIS M. HARTMAN,
Attorneys for Defendant. [66]

**[Petition for Settlement and Allowance of Bill of
Exceptions.]**

*In the United States District Court for the District
of Arizona.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

And now in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions in this case, as to counts one, two, three, four, five and six, as set forth in plaintiff's complaint herein, and prays that the same may

be settled and allowed and signed and certified by the Judge as provided by law.

Dated this 17th day of July, 1914.

FRANCIS M. HARTMAN,
Attorney for Defendant. [67]

*In the United States District Court for the District
of Arizona.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Notice of Filing Bill of Exceptions.

To the Above-named Plaintiff, and to Messrs.
Thomas A. Flynn and Samuel L. Pattee, Its
Attorneys:

You and each of you will hereby please take notice that the defendant in the above-entitled cause, desiring and intending to prosecute a writ of error from the judgment of the above-entitled court in the above-entitled cause, entered on the 22d day of May, 1914, on the first, second, third, fourth, fifth and sixth causes of action, as set forth in the complaint herein, has prepared and this day filed in the office of the Clerk of the above-entitled court, for presentation to the Honorable Wm. H. Sawtelle, the Judge who tried the above-entitled cause, defendant's bill

of exceptions, copy of which is this day served upon you.

Dated July 18th, 1914.

FRANCIS M. HARTMAN,
Attorney for Defendant. [68]

*In the United States District Court for the District
of Arizona.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

Order Settling Bill of Exceptions.

The foregoing bill of exceptions is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein.

Dated this 23d day of July, A. D. 1914.

WM. H. SAWTELLE,
Judge.

[Endorsements]: No. 5 (Tucson). In the United States District Court for the District of Arizona. United States of America, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Defendant's Bill of Exceptions. Filed Jul. 18, A. D. 1914. George W. Lewis, Clerk. By S. D. Gromer, Deputy Clerk. [69]

[Petition for Writ of Error.]

*In the United States District Court, for the District
of Arizona.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

DEFENDANT'S PETITION FOR WRIT OF
ERROR AS TO COUNTS ONE, TWO,
THREE, FOUR, FIVE AND SIX AS SET
FORTH IN PLAINTIFF'S COMPLAINT.

To the Honorable WM. H. SAWTELLE, Judge of
the District Court Aforesaid:

Now comes Southern Pacific Company, a corpora-
tion, by its attorney, and respectfully represents:

That this action is brought to recover certain pen-
alties arising under the Act of Congress known as
the "Hours of Service Act," and that the petition or
complaint herein contains twelve counts or causes of
action.

That on the twenty-second day of May, A. D. 1914,
the Court directed a verdict against your petitioner
and in favor of the plaintiff, the United States of
America, as to the first, second, third, fourth, fifth
and sixth counts or causes of action, as set forth in
plaintiff's complaint herein, and upon said verdict
final judgment was entered on the said twenty-second

day of May, 1914, against your petitioner, Southern Pacific Company, defendant herein.

Your petitioner, feeling it is aggrieved by said verdict and judgment entered herein as aforesaid, herewith petitions and asks for an *other* allowing it a writ of error to the Circuit Court of Appeals for the Ninth Circuit under the laws of the United States in such cases made and provided. [70]

WHEREFORE, said defendant prays for the allowance of a writ of error and for an order fixing the amount of bond for a supersedeas in said cause, and the signing of a citation, and for such other orders and process as may cause the same to be corrected by the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 20th day of July, 1914.

(Signed) FRANCIS M. HARTMAN,
Attorney for Defendant.

Allowed:

Judge.

[Endorsements]: In the United States District Court for the District of Arizona. United States of America, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Defendant's Petition for Writ of Error as to Counts 1, 2, 3, 4, 5 and 6. Filed July 21, A. D. 1914. George W. Lewis, Clerk. By S. D. Gromer, Deputy Clerk. [71]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Assignment of Errors.

Now comes Southern Pacific Company, a corpora-
tion, by its attorneys and says that in the record and
proceedings herein in the United States District
Court for the District of Arizona there is manifest
error to the great prejudice of the Southern Pacific
Company, in this, to wit:

1. That said Court erred in sustaining the objec-
tion of counsel for defendant in error, as calling for
a conclusion of the witness, to the following ques-
tions propounded to the witness William Wilson, by
counsel for plaintiff in error: "Q. How long were
these men (referring to the employees of plaintiff in
error mentioned in plaintiff's complaint herein) on
duty?"

For the reason that said witness had already tes-
tified that as chief dispatcher he was in direct charge
of said employees at the time and place referred to
and knew when they went on duty and when they
were relieved.

2. That the said Court erred in sustaining the
objection of counsel for defendant in error, as calling

for a conclusion of law, to the following question propounded to the witness William Wilson, on cross-examination, by counsel for plaintiff in error, to wit:

“Q. And how long were they (meaning the employees of the plaintiff in error referred to in the complaint of the [72] defendant in error herein) on duty, counting out the two hours and twenty-five minutes and the one hour's time they were relieved at Bowie?”

For the reason that the said witness had theretofore testified that he was at the time mentioned in the complaint of the defendant in error herein Chief Dispatcher of the Southern Pacific Company, at Tucson, Arizona, directly in charge of the employees of said company mentioned and referred to in the complaint of the defendant in error herein, and that the said employees, to wit, B. T. Sullivan, W. E. Brown, H. F. Peacock and C. G. Harrison, referred to therein, and each of them, were relieved and released on the date referred to in the complaint of the defendant in error, herein, for the definite period of two hours and twenty-five minutes, at the station of Bowie, to wit, from 9:15 o'clock A. M. to 11:40 o'clock A. M.; and were again relieved and released at said station of Bowie for the definite period of one hour, to wit, from 1:20 P. M. to 2:20 P. M.; and that the said employees, to wit, Billy F. Eaker and Frank H. Kempf, were relieved and released at the said station of Bowie for a definite period of one hour, to wit, from 1:30 o'clock P. M. to 2:30 o'clock P. M.; and that the question as to how long said

employees were on duty, eliminating the two periods of two hours and twenty-five minutes and one hour was a question of fact material to the issues herein, which should have been submitted to the jury.

3. That the said Court erred in sustaining the objection of counsel for defendant in error, as incompetent, irrelevant and immaterial and not tending to prove any issue in the case, to the following question propounded to the witness William Wilson, on cross-examination, by counsel for the plaintiff in error: "Q. What did you, as chief dispatcher [73] for this company on this division, and the other officers of the company, do, as far as you know of your own knowledge, in this particular case mentioned in this complaint as to complying with this law?" (meaning the hours of service act).

For the reason that said question was competent, relevant and material to the issues involved in this case, because the evidence sought to be elicited by said question would tend to prove that plaintiff in error was acting in good faith and endeavoring to prevent any of its employees and particularly the employees mentioned and referred to in the complaint of defendant in error herein, from violating the provisions of the law known as the "Hours of Service Act"; and that the evidence sought to be elicited by the said question would prove or tend to prove that the employees mentioned in the complaint of defendant in error herein were released and relieved by the said witness, as Chief Dispatcher of the Southern Pacific Company, in order that the said employees should not be on duty for a longer period

than sixteen consecutive hours on the date referred to.

4. That the said Court erred in sustaining the objection of counsel for defendant in error to the following question propounded to the witness William Wilson, by counsel for plaintiff in error: "Q. Is two hours and twenty-five minutes sufficient time for rest and recreation?" For the reason that said witness had already testified that certain employees of the plaintiff in error as mentioned and referred to in the complaint of defendant in error herein were relieved and released at the station of Bowie, on the date referred to in the complaint, for the definite period of two hours and twenty-five minutes, and that the said [74] witness, as an experienced railroad man, was competent to testify as to whether or not such a length of time was sufficient for rest and recreation for said employees; and that such question as to whether or not such length of time was sufficient for said employees for rest and recreation was a material question of fact which should have been submitted to the jury.

5. That the said Court erred in sustaining the objection of the counsel for defendant in error to the following question propounded to witness William Wilson, on cross-examination, by counsel for plaintiff in error, and also in striking out the answer of the witness to said question, to wit: "Q. Was the one hour that the train crew was released from 1:20 to 2:20 P. M., sufficient at that time and place for these men, for rest and recreation? A. Yes." For the reason that the question as to whether or not one

hour was sufficient time for rest and recreation for the said train and engine crews was a material question of fact in the case and should have been submitted to the jury for determination.

6. That the said Court erred in sustaining the objection of counsel for defendant in error to the following question, propounded to the witness William Wilson, on cross-examination, by counsel for plaintiff in error, to wit: "Q. Mr. Wilson, was Billy F. Eaker on duty for a longer period than sixteen consecutive hours on December 21st, 1912, as alleged in the complaint, from 5:30 o'clock A. M. to 10:29 o'clock P. M., of that day?"

For the reason that the said witness had already testified that he was in direct charge of said employee and that said employee had been released for a definite period of one hour, to wit, [75] from 1:30 o'clock P. M. to 2:30 o'clock P. M., on said day. That the question as to whether or not the said Eaker was on duty for a longer period than sixteen consecutive hours on said date was a question of fact which should have been submitted to the jury.

7. That the Court erred in sustaining the objection of counsel for defendant in error that the same called for a conclusion of law, to the following question, propounded to the witness William Wilson, on cross-examination, by counsel for plaintiff in error, to wit: "By Mr. Hartman (Counsel for Defendant). We desire to ask the same question of the witness for the record as to each of the six counts." (Meaning were either Frank H. Kempf, B. T. Sullivan, W. E. Brown, H. F. Peacock or C. G. Harrison on duty for

a longer period than sixteen consecutive hours on December 21st, 1912, as alleged in the complaint.)

For the reason that the question as to whether or not the said employees were on duty for a longer period than sixteen consecutive hours on said date was a question of fact which should have been submitted to the jury, and that said witness, if he had been allowed to answer said question, would have testified that neither of said employees were on duty for a longer period than sixteen consecutive hours on said date.

8. That the Court erred in granting the motion of counsel for defendant in error to strike from the record and that the same be excluded from the jury certain testimony of the witness B. T. Sullivan, a witness on behalf of defendant in error, and being one of the employees of plaintiff in error mentioned in said complaint, and who was charged by defendant in error of having been permitted to be or remain on duty for a longer period than sixteen consecutive [76] hours, as follows: "That he was released at Bowie at 1:20 P. M. to go to work at 2:20 P. M., and that he was off duty for an hour," for the reason that the said question as to whether or not witness was off duty at Bowie for one hour, from 1:20 P. M. to 2:20 P. M., was a question of fact to be submitted to the jury and about which the witness was competent to testify, and the same should not have been stricken from the record nor excluded from the jury.

9. That the said Court erred in sustaining the objection of counsel for defendant in error, that the same was incompetent, to a certain question pro-

pounded to the witness B. F. Eaker, on cross-examination, by counsel for plaintiff in error, to wit: "Q. Were you or your fireman required or permitted to be or remain on duty for a longer period than sixteen consecutive hours, to wit, from 5:30 A. M. to 10:29 o'clock P. M., on the 21st day of December, 1912?"

For the reason that the said witness was competent and qualified to testify as to whether or not he or his fireman were required or permitted to be or remain on duty for a longer period than sixteen consecutive hours on said date; for the reason that said testimony was competent, relevant and material; for the reason that the question as to whether or not the said Eaker or the said Kempf were required or permitted to be or remain on duty for a longer period than sixteen consecutive hours on said date was a question of fact which should have been submitted to the jury; and for the reason that the plaintiff in error could have proved by said witness, if the witness had been permitted to answer said question, that neither said witness Eaker nor said Kempf, the engineer, and fireman, respectively, of said train, were required or permitted to be or remain on duty for a longer period than [77] sixteen consecutive hours on the date mentioned in the complaint of defendant in error herein.

10. That the said Court erred in rejecting certain evidence offered by plaintiff in error, being a certain document marked for identification "Defendant's Exhibit No. 3," which is in the following

words and figures, to wit:

“BULLETIN NO. 1727.

February 11, 1910.

TO TRAIN AND ENGINE MEN:

There is a lack of understanding as to the interpretation of the Federal Law relative to excessive service and under what conditions a train may proceed to its terminal when the service will exceed sixteen hours. The law provides that under certain conditions due to casualties or causes which could not have been foreseen at the time of leaving terminal, the law will not apply and it is possible for train to proceed to its terminal destination. Hereafter the following will apply: Be careful in giving delays, to state all causes, particularly such as break-in-two's and any defects in engine which might have caused delay and if you receive a message over my signature that the law will not apply in your case, giving the reason therefor, and stating that you may proceed to terminal, be governed accordingly; otherwise you will see that you do not perform any service in excess of sixteen hours, this sixteen hours to include the thirty minutes prior to time called to leave your initial terminal. You will, however, use every effort to protect the company's interest by asking for instructions and giving full information as to the delays which might constitute the reason for the law becoming inoperative, in ample time to permit the receipt of instructions referred to. Conductors in wiring delays which involve any defects of engine must have message signed jointly by the engineer to [78] avoid any misunderstanding which might re-

sult in violation of the law.

W. H. WHALEN, Superintendent."

For the reason that the same was competent, relevant and material to the issues involved in the case: For the reason that the same tended to show that plaintiff in error was acting in good faith in its efforts to abide by the law known as the Hours of Service Act, and was taking every precaution to avoid violating said law by issuing strict instructions to each and all of its employees, including the employees named in the complaint of defendant in error herein, that said law should not be violated and that no service should be performed in excess of sixteen consecutive hours.

11. That the said Court erred in rejecting in evidence the offer made by counsel for plaintiff in error of a certain document marked "Defendant's Exhibit 4 for Identification," which is in the following words and figures:

"BULLETIN No.

August 16, 1912.

TO TRAIN AND ENGINE MEN:

There is a lack of understanding as to the Federal Law relative to excessive service and under what conditions a train may proceed to its terminal when the service will exceed sixteen hours. The law provides that under certain conditions due to casualties or causes which could not have been foreseen at the time of leaving terminal, the law will not apply and it is permissible for train to proceed to its terminal destination. Hereafter the following will apply: Be careful in giving delays to state all causes, par-

ticularly such as break in twos and any defects in engine which might have caused delay and if you receive a message over my signature that the law will not apply in your case, giving the reason therefor, [79] and stating that you may proceed to terminal, be governed accordingly; otherwise you will see that you do not perform any service in excess of sixteen hours, this sixteen hours to include the thirty minutes prior to time called to leave your initial terminal. You will, however, use every effort to protect the company's interest by asking for instructions and giving full information as to delays which might constitute the reason for the law being inoperative, in ample time to permit the receipt of instructions referred to. Conductors in wiring delays which involve any defects of engine must have message signed jointly by the engineer to avoid any misunderstanding which might result in violation of the law.

J. H. DYER, Superintendent."

For the reason that the same was competent, relevant and material to the issues involved in the case: For the reason that the same tended to show that plaintiff in error was acting in good faith in its efforts to abide by the law known as the Hours of Service Act, and was taking every precaution to avoid violating said law by issuing strict instructions to each and all of its employees, including the employees named in the complaint of defendant in error herein that said law should not be violated and that no service should be performed in excess of sixteen consecutive hours.

12. That the Court erred in rejecting in evidence the offer made by counsel for plaintiff in error of a certain document marked for identification "Defendant's Exhibit No. 5," which is in the following words and figures, to wit:

"Tucson, Arizona, May 17th, 1910.

Mr. P. Slater,

Trainmaster—YUMA.

Mr. C. M. Murphy,

Trainmaster—LORDSBURG. [80]

Mr. B. F. Scarborough,

Chf. Dispr. —TUCSON.

Mr. M. J. Kingsbury,

Term. T. M.—GILA.

Gentlemen:

We are in receipt of rulings from the General Manager that in view of the frequent violations of the 16-hour law that hereafter employees responsible for authorizing such violations will be discharged from the service.

Mr. Scarborough is in possession of all the rulings bearing on this subject, and the matter will be taken up with a view of having rulings up to date prepared and furnished us for distribution. In the meantime I would request that Trainmasters and Terminal Trainmaster take no chances whatever by authorizing service in excess of 16 hours. Mr. Kingsbury will be very particular not to permit any trainmen to do switching in Gila yard which in any possibility would call for violation of the Hours of Service law.

Yours truly,

(Sgnd.) G. L. HICKEY, Asst. Supt."

For the reason that the same was competent, relevant and material to the issues involved in the case; for the reason that the same tended to show that plaintiff in error was acting in good faith in its efforts to abide by the law known as the Hours of Service Act, and was taking every precaution to avoid violating said law by issuing strict instructions to each and all of its employees, including the employees named in the complaint of defendant in error herein, that the said law should not be violated and that no service should be performed in excess of sixteen consecutive hours.

13. That said Court erred in granting the motion of defendant in error at the close of the testimony that the Court direct the jury to return a verdict in favor of defendant [81] in error on the first, second, third, fourth, fifth and sixth causes of action, as set forth in the complaint, for the reason that the undisputed testimony in the case showed that neither of the employees of plaintiff in error named in the complaint of defendant in error were required or permitted to remain on duty for a longer period than sixteen consecutive hours, as alleged in said complaint; for the reason that the undisputed testimony in the case showed that neither of said employees were on duty for a longer period than sixteen consecutive hours as charged in said complaint; for the reason that the undisputed testimony showed that the train crew, composed of B. T. Sullivan, W. E. Brown, H. F. Peacock and C. G. Harrison, being the employees named in the complaint of defendant in error, were released and relieved at Bowie, Ari-

zona, for the definite period of two hours and twenty-five minutes, to wit, from 9:15 A. M. to 11:40 A. M., and that they were not on duty for said period of two hours and twenty-five minutes, and that they were not performing any service whatever for the plaintiff in error during said period: That during said period they were not waiting around subject to be called to go to work but were entirely free to go and come as they chose; ~~that said period of two hours and twenty-five minutes, and that they were not performing any service whatever for plaintiff in error during said period: That during said period they were not waiting around subject to be called to go to work but were entirely free to go and come as they chose:~~ that said period of two hours and twenty-five minutes was sufficient for rest and recreation for said employees at said time, and that said employees did obtain rest and recreation during said period of said release; that said employees were relieved [82] and released again at said station of Bowie on said date, for the definite period of one hour, to wit, from 1:20 o'clock P. M. to 2:20 o'clock P. M.; that during said period of one hour said employees were not performing any service for plaintiff in error; that during said time said employees were not waiting around expecting to be called to go to work; that during said period said employees were free to come and go as they chose; that said period of one hour was sufficient for rest and recreation of said employees at said place, and that said employees did obtain rest and recreation during said period of release of one hour. For the reason that the undis-

puted testimony in said case showed that the said train crew, composed of B. T. Sullivan, W. E. Brown, H. F. Peacock and C. G. Harrison, were relieved and released on said run at the station of Bowie, Arizona, for the definite period of two hours and twenty-five minutes, to wit, from 9:15 A. M. to 11:40 A. M., and were again released at Bowie for the definite period of one hour, to wit, from 1:20 P. M. to 2:20 P. M.; and that after deducting said two hours and twenty-five minutes and said one hour periods from the time of said employees' commencing work, to wit, 5:30 A. M., until they arrived at the end of the run, to wit, 12:40 A. M. of the next day, they were not on duty for a longer period than sixteen consecutive hours. For the reason that the undisputed testimony in this case shows that the said B. F. Eaker and Frank H. Kempf were relieved and released at Bowie, Arizona, on said run, for a definite period of one hour, to wit, from 1:30 P. M. to 2:30 P. M.; that during said period the said employees were not performing any duty for plaintiff in error; that said period was sufficient for rest and recreations of said employees. That said employees did obtain rest and [83] recreation during said period and that deducting said period of release said employees were not on duty for a longer period than sixteen consecutive hours. For the reason that the question as to whether or not the employees of the plaintiff in error as mentioned in said complaint of defendant in error herein were allowed or permitted to be or remain on duty for a longer time than sixteen consecutive hours was a question of fact which

should have been submitted to the jury.

14. That the said Court erred in denying the motion made by the counsel for plaintiff in error at the close of the testimony that the Court direct the jury to return a verdict in favor of plaintiff in error upon the first, second, third, fourth, fifth and sixth causes of action as set forth in the complaint of defendant in error herein, and that in case said motion be denied it have leave to go to the jury; for the reason that the undisputed testimony in the case showed that neither of the employees of plaintiff in error named in the complaint of defendant in error were required or permitted to be or remain on duty for a longer period than sixteen consecutive hours, as alleged in said complaint; for the reason that the undisputed testimony in the case showed that neither of said employees were on duty for a longer period than sixteen consecutive hours as charged in said complaint; for the reason that the undisputed testimony showed that the train crew, composed of B. T. Sullivan, W. E. Brown, H. F. Peacock and C. G. Harrison, being the employees named in the complaint of defendant in error, were released and relieved at Bowie, Arizona, for the definite period of two hours and twenty-five minutes, to wit, from 9:15 A. M. to 11:40 A. M.; that they were not on duty for said period of two hours and twenty-five minutes, and that they were not performing any service [84] whatever for plaintiff in error during said period; that during said period they were not waiting around subject to be called to go to work but were entirely free to come and go as they chose;

that said period of two hours and twenty-five minutes was sufficient for rest and recreation for said employees at said time, and that said employees did obtain rest and recreation during said period of said release; that said employees were relieved and released again at said station of Bowie on said date, for the definite period of one hour, to wit, from 1:20 P. M. to 2:20 P. M.; that during said period of one hour said employees were not performing any service for plaintiff in error; that during said time said employees were not waiting around expecting to be called to go to work; that during said period said employees were free to come and go as they chose; that said period of one hour was sufficient for rest and recreation of said employees at said time and place, and that said employees did obtain rest and recreation during said period of release of one hour. For the reason that the undisputed testimony in said cases shows that the said train crew, composed of B. T. Sullivan, W. E. Brown, H. F. Peacock and C. G. Harrison, were relieved and released on said run at the station of Bowie, Arizona, for the definite period of two hours and twenty-five minutes, to wit, from 9:15 A. M. to 11:40 A. M., and were again released at Bowie for the definite period of one hour, to wit, from 1:20 P. M. to 2:20 P. M.; and that after deducting said two hours and twenty-five minutes and said one hour period of time from the total time of said employees from the time of commencing work, to wit, 5:30 A. M., until they arrived at the end of said run, to wit, 12:40 A. M. of the next day, they were not on duty for a longer period than sixteen

consecutive hours. For the reason [85] that the undisputed testimony in the case shows that said B. F. Eaker and Frank H. Kempf were relieved and released at Bowie, Arizona, on said run, for a definite period of one hour, to wit, from 1:30 P. M. to 2:30 P. M. That during said period the said employees were not performing any duty for plaintiff in error; that said period was sufficient for rest and recreation of said employees; that said employees did obtain rest and recreation during said period, and that deducting said period of said release said employees were not on duty for a longer period than sixteen consecutive hours. For the reason that the question as to whether or not the employees of the plaintiff in error, as mentioned in said complaint of defendant in error, were allowed or permitted to be on duty for a longer time than sixteen consecutive hours was a question of fact which should have been submitted to the jury.

15. That the Court erred in giving the following instruction to the jury: "Under the law as I understand it and on the undisputed testimony in this case, including the telegram sent by the train master Mr. Wilson to the Agent at Bowie, I deem it my duty to give the request made by the Government, and direct you to find for the plaintiff on the first, second, third, fourth, fifth and sixth causes of action of plaintiff's complaint, and I deny the motion and request of defendant, and therefore you will, without retiring, sign and record your verdict."

For the reason that the undisputed testimony in the case showed that neither of the employees of

plaintiff in error named in the complaint of defendant in error were required or permitted to remain on duty for a longer period than sixteen consecutive hours, as alleged in said complaint. For [86] the reason that the undisputed testimony in the case showed that neither of said employees were on duty for a longer period than sixteen consecutive hours as charged in said complaint. For the reason that the undisputed testimony showed that the train crew, composed of B. T. Sullivan, W. E. Brown, H. F. Peacock and C. G. Harrison, being the employees named in the complaint of the defendant in error, were released and relieved at Bowie, Arizona, for the definite period of two hours and twenty-five minutes, to wit, from 9:15 A. M. to 11:40 A. M.; that they were not on duty for said period of two hours and twenty-five minutes, and that they were not performing any service whatever for the plaintiff in error during said period; that during said period they were not waiting around subject to be called to go to work but were entirely free to come and go as they chose; that said period of two hours and twenty-five minutes was sufficient for rest and recreation for said employees at said time, and that said employees did obtain rest and recreation during said period of said release; that said employees were relieved and released again at said station of Bowie on said date, for the definite period of one hour, to wit, from 1:20 P. M. to 2:20 P. M.; that during said period of one hour said employees were not performing any service whatever for plaintiff in error; that during said time said employees were not waiting

around expecting to be called to go to work; that during said period said employees were free to come and go as they chose; that said period of one hour was sufficient for rest and recreation of said employees at said time and place, and that said employees did obtain rest and recreation during said period of release of one hour. For the reason that the undisputed testimony in the case shows that the said train crew, composed of B. T. Sullivan, W. E. Brown, H. F. Peacock and C. G. Harrison, were relieved and released [87] on said run at the station of Bowie, Arizona, for the definite period of two hours and twenty-five minutes, to wit, from 9:15 A. M. to 11:40 A. M., and were again released at Bowie for the definite period of one hour, to wit, from 1:20 P. M. to 2:20 P. M.; and that after deducting said two hours and twenty-five minutes and said one hour's period of time from the total time of said employees from the time of commencing work, to wit, 5:30 A. M., until they arrived at the end of the run, to wit, 12:40 A. M., of the next day, they were not on duty for a longer period than sixteen consecutive hours. For the reason that the undisputed testimony in the case shows that said B. F. Eaker and Frank H. Kempf were relieved and released at Bowie, Arizona, on said run, for a definite period of one hour, to wit, from 1:30 P. M. to 2:30 P. M.; that during said period the said employees were not performing any duty for plaintiff in error; that said period was sufficient for rest and recreation of said employees; that said employees did obtain rest and recreation during said period and that deducting said period of said release, said employees

were not on duty for a longer period than sixteen consecutive hours. For the reason that the question as to whether or not the employees of the plaintiff in error, as mentioned in said complaint of defendant in error, were required or permitted to be or remain on duty for a longer time than sixteen consecutive hours was a question of fact which should have been submitted to the jury.

WHEREFORE, by reason of the errors aforesaid, the said Southern Pacific Company prays that the judgment rendered and entered in this action, so far as the same related to the first, second, third, fourth, fifth and sixth causes of action aforesaid, be avoided, annulled and reversed and [88] that the said District Court of the United States for the District of Arizona be directed to grant a new trial of said cause.

(Signed) FRANCIS M. HARTMAN,
Attorney for Plaintiff in Error, Defendant in the
Lower Court.

[Endorsements]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Assignment of Errors. Filed July 21, A. D. 1914. George W. Lewis, Clerk. By S. D. Gromer, Deputy Clerk. [89]

*In the United States District Court for the District
of Arizona.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:

That we, Southern Pacific Company, a corporation, as principal, and L. H. Manning and Hugo J. Donan, of the county of Pima, State of Arizona, and District aforesaid, as sureties, are held and firmly bound unto the United States of America in the full and just sum of ONE THOUSAND DOLLARS, to be paid to the said United States of America, its attorneys or assigns, for the payment of which well and truly to be made we bind ourselves, our successors, assigns, executors and administrators, jointly and severally, firmly by these presents.

Signed and dated this 18th day of July, A. D. 1914.

WHEREAS, lately, at a regular term of the District Court of the United States for the District of Arizona, sitting at Tucson, in said District, in a suit pending in said court between the United States of America, as plaintiff, and Southern Pacific Company, a corporation, as defendant, cause No. 5, at Tucson, on the law docket of said court, final judgment was rendered against the said Southern Pacific

Company, a corporation, for the sum of four hundred and two dollars, and the said Southern Pacific [90] Company, a corporation, has obtained a writ of error and filed a copy thereof in the Clerk's office of said court, to reverse the judgment of said court in the aforesaid suit, and a citation directed to the said United States of America, defendant in error, citing it to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, according to law, within thirty days from the date hereof.

Now the condition of the above obligation is such that if the said Southern Pacific Company, a corporation, shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

And the said L. H. Manning and Hugo J. Donan, the sureties hereto, expressly agree that in case of breach of any condition hereof, the above-entitled court may upon notice to them of not less than ten days proceed summarily in this action to ascertain the amount which we, as such sureties, are bound to pay on account of such breach and to render judgment therefor against us and each of us and award execution therefor.

SOUTHERN PACIFIC COMPANY,

By FRANCIS M. HARTMAN,

Its Attorney.

(Sgnd.) L. H. MANNING.

(Sgnd.) HUGO J. DONAN. [91]

State of Arizona,
County of Pima,—ss.

L. H. Manning and Hugo J. Donan, the sureties on the within undertaking, being first duly sworn, each for himself and not one for the other, says: That he is a resident and householder within the county of Pima, State of Arizona, and within the district aforesaid; that he is worth the sum of one thousand dollars, the amount specified in the foregoing bond, over and above all just debts and liabilities and exclusive of property exempt from execution.

(Sgnd.) L. H. MANNING.

(Sgnd.) HUGO J. DONAN.

Subscribed and sworn to before me this 18th day of July, 1914.

[N. P. Seal] R. W. LANGWORTHY,
Notary Public, Pima Co., Arizona.

Approved this 21st day of July, A. D. 1914.

(Sgnd.) WM. H. SAWTELLE,

Judge. [92]

State of Arizona,
County of Pima,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify that L. H. Manning and Hugo J. Donan, the parties to this bond whose genuine signatures are subscribed thereto, are in my opinion good and ample security for the amount therein specified, and that they have property in the said county of Pima, State of Arizona, subject to execution in excess of the amount of said bond, and that

if the bond was presented to me for approval the same would be accepted and approved.

WITNESS my hand this 21st day of July, A. D. 1914.

[Seal] (Sgnd.) GEORGE W. LEWIS,
Clerk.

By S. D. Gromer,
Deputy.

[Endorsements]: No. ——. In the United States District Court for the District of Arizona. United States of America, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Supersedeas Bond of Defendant on Writ of Error. Filed July 21, A. D. 1914. George W. Lewis, Clerk. By S. D. Gromer, Deputy Clerk. [93]

**[Order Allowing Writ of Error and Fixing Amount
of Bond.]**

*In the United States District Court for the District
of Arizona.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Upon motion of Francis M. Hartman, Esq., attorney for defendant, and upon filing a petition for a writ of error and assignment of errors, it is ordered that a writ of error be and hereby is allowed to have

reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein and that the amount of the supersedeas bond on said writ of error be and it hereby is fixed at one thousand dollars, and upon the filing of such bond and the approval thereof by the Judge of this court that all further proceedings herein be suspended until the determination of said writ of error by said Circuit Court of Appeals.

Dated this 21st day of July, A. D. 1914.

WM. H. SAWTELLE,
Judge.

[Endorsements]: In the United States District Court for the District of Arizona. United States of America, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Order That Writ of Error Issue. Filed July 21, A. D. 1914. George W. Lewis, Clerk. By S. D. Gromer, Deputy Clerk.
[94]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error [Original].

United States of America,—ss.

The President of the United States to the Honorable
Judge of the District Court of the United States
for the District of Arizona, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Southern Pacific Company, a corporation, plaintiff in error, and United States of America, defendant in error, a manifest error has happened to the damage of Southern Pacific Company, a corporation, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid, in this behalf do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then [95] and there held, and the record and proceedings aforesaid being inspected, the said United States Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS, the Hon. EDWARD D. WHITE,
Chief Justice of the United States, this the 21st day
of July, A. D. 1914.

[Seal] GEORGE W. LEWIS,
Clerk of the United States District Court for the
District of Arizona.

By S. D. Gromer,
Deputy Clerk. [96]

[Endorsed]: No. ——. In the United States Cir-
cuit Court of Appeals for the Ninth Circuit. South-
ern Pacific Company, a Corporation, Plaintiff in
Error, vs. United States of America, Defendant in
Error. Writ of Error. Filed July 21, A. D. 1914,
at — M. George W. Lewis, Clerk. By S. D.
Gromer, Deputy Clerk. [97]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Citation [on Writ of Error (Original)].

United States of America,—ss.

To the United States of America, Greeting:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit, at the city of San Fran-
cisco, State of California, on the 19th day of August,

A. D. 1914, pursuant to writ of error filed in the office of the Clerk of the United States District Court for the District of Arizona, wherein the Southern Pacific Company, a corporation, is plaintiff in error, and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Hon. EDWARD D. WHITE,
Chief Justice of the Supreme Court of the United States, this 21st day of July, A. D. 1914.

WM. H. SAWTELLE,
United States District Judge for the District of Arizona. [98]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

SOUTHERN PACIFIC COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Service of the foregoing Citation in the above-entitled action is hereby admitted and accepted this 21st day of July, A. D. 1914.

THOMAS A. FLYNN,
M. C. LIST,
SAMUEL L. PATTEE,

Attorneys for United States of America, Defendant
in Error. [99]

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation. Filed July 22, A. D. 1914, at — M. George W. Lewis, Clerk. By S. D. Gromer, Deputy Clerk. [100]

In the United States District Court for the District of Arizona.

No. 5—(TUCSON).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Praeceptum for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the appeal heretofore perfected to said court upon the first, second, third, fourth, fifth and sixth causes of action herein, and include in the said transcript the following pleadings, proceedings, and papers on file, to wit:

- (1) The complaint.
- (2) The summons and return of service.
- (3) The answer of defendant.
- (4) The impaneling of the jury.

- (5) The verdict.
- (6) The judgment.
- (7) The bill of exceptions duly taken at the trial.
- (8) The petition for writ of error.
- (9) The assignment of errors.
- (10) The bond and approval.
- (11) Allowance of writ of error.
- (12) The original writ of error.
- (13) The original citation in error.
- (14) The clerk's certificate. [101]

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit and on file in the office of said Circuit Court of Appeals at San Francisco, California, before August 19th, 1914.

FRANCIS M. HARTMAN,
Attorney for Appellant. [102]

*In the United States District Court for the District
of Arizona.*

No. 5—(TUCSON).

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Clerk's Certificate to Transcript.

United States of America,
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing pages, numbered 1 to 94, both numbers inclusive, present a true, full, and correct copy of the proceedings had and orders entered as therein stated, in cause No. 5 (Tucson), wherein the United States of America, was plaintiff and Southern Pacific Company, a corporation, was defendant, as the same appears of record and on file in this office, except that the original writ of error and citation in error are embraced therein at pages 95 and 100 respectively, all of which constitute the entire transcript of the proceedings in the cause as therein stated.

I further certify that the cost of the foregoing return to writ of error is forty-three and 80/100 (\$43.80) dollars, and that said amount was paid to me by Francis M. Hartman, Esq., attorney for plaintiff in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 10th day of August, A. D. 1914.

[Seal] GEORGE W. LEWIS,
Clerk of the United States District Court for the
District of Arizona.

By S. D. Gromer,
Deputy Clerk. [103]

[Endorsed]: No. 2463. United States Circuit Court of Appeals for the Ninth Circuit. The Southern Pacific Company, a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Received and filed August 13, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2463.

**In the United States Circuit Court of
Appeals for the Ninth District.**

THE SOUTHERN PACIFIC CO., A CORPORATION, PLAIN-
TIF IN ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN
ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE
DISTRICT OF ARIZONA.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

THOMAS A. FLYNN,
United States Attorney.

PHILIP J. DOHERTY,
Special Assistant United States Attorney.

In the United States Circuit Court of Appeals for the Ninth Circuit.

SOUTHERN PACIFIC CO., A CORPORATION, plaintiff in error, <i>v.</i> UNITED STATES OF AMERICA, DEFENDANT in error.	} No. 2463.
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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This suit was instituted by the Government to recover from the defendant, the Southern Pacific Co., a corporation, penalties for 12 violations of the Federal hours-of-service act.

The last six causes of action were disposed of by demurrer of the plaintiff to the defendant's answer, and the action of the trial court in overruling this demurrer is now before this court for review, being No. 2443, thus leaving the first six causes of action of the complaint for trial.

Each of the first six causes of action here in question relates to the service of individual members of a single train crew and charge a violation of the hours-

of-service act in that the defendant required and permitted one of its train employees, engaged and connected with the movements of its train in interstate commerce, to be and remain on duty for a longer period than 16 consecutive hours, the period of service alleged being 16 hours and 59 minutes for the two members of the engine crew, to wit, from 5.30 a. m. on December 21, 1912, to 10.29 p. m. on said date, and 19 hours and 10 minutes for the four members of the train crew, to wit, from 5.30 a. m. on December 21, 1912, to 12.40 a. m. December 22, 1912.

Defendant's answer admitted all the material allegations of the complaint except that the employees in question were on duty continuously for more than 16 consecutive hours, which it denied.

The case was tried to a jury, and the defendant contended that the four employees constituting the train crew were released at Bowie for the following definite periods (rec., p. 32):

from 9.15 a. m. to 11.40 a. m., 2 hours and 25 minutes; from 1.20 p. m. to 2.20 p. m., 1 hour—

and that the two members of the engine crew were released at Bowie from 1.30 p. m. to 2.30 p. m., 1 hour (rec., p. 34); that during such periods these employees were not "on duty" within the meaning of the hours of service law, and that deducting such periods of release neither of the employees in question was on duty for a longer period than 16 consecutive hours.

The evidence was undisputed that the employees in question commenced duty and finally went off duty at the times named in plaintiff's complaint (rec., pp. 32, 34), the only question being whether they were "on duty" during the times they were alleged to have been released. The material portions of the evidence introduced on this point may be briefly summarized as follows:

A notation on the train sheet showed that the four members of the train crew were released at Bowie from 9.15 a. m. until 11.40 a. m., and from 1.20 p. m. until 2.20 p. m. (Rec., p. 32.) The first release was sent by message to the agent and read to release the crew and call for them when he could give them an engine, to advise time released and recalled, and to see that it was as much as an hour, so that credit could be had for it. (Rec., p. 32, 62.) A second message was sent to the conductor covering the release from 1.20 p. m. to 2.20 p. m. (Rec., p. 32.) The notation on the train sheet was made from a message received from the conductor stating that this extra had been released at Bowie at 9.15 a. m. and called to go to work at 11.40 a. m., and that they had been released at 1.20 p. m. to go to work at 2.20 p. m. (Rec., p. 33, 61.)

The engineer and fireman of this crew were released at Bowie from 1.30 p. m. to 2.30 p. m., but the records do not show for what purpose. (Rec., p. 34.) The notation on the train sheet of this release was made

by a despatcher who came on duty at 4 p. m. (Rec., p. 34.)

The purpose of the first release at Bowie was so that the engine of this train could be used for other service. (Rec., p. 32.) The release was given so it could be used as being off duty and to work the employees to get them nearer Benson, the destination of the trip. (Rec., p. 42.) The reason the first release was given to the train crew for 2 hours and 25 minutes was at that time it looked as though the engine would be back to Bowie and start work about 11.40 a. m. (Rec., p. 42.) If conditions had been normal the release would not have been given at Bowie; but on account of conditions there, with a lot of switching to do, the releases were meant to cover delays which they saw would be encountered at Bowie. (Rec., p. 44.)

During the times released the train crew was around the hotel and reading or sitting under trees or in the caboose (rec., p. 49), and were not performing any active work for the railroad company. (Rec., p. 39.) Between the two periods of releases, from 11.40 a. m. to 1.20 p. m., the train crew was under instructions, but was not doing any work. (Rec., p. 43.) The conductor's trip report shows that they were at Bowie 3 hours and 25 minutes waiting for engine. (Rec., p. 64.)

The chief dispatcher testified that the company did not know exactly when they could get them out of Bowie, and that the train did not finally leave there

until 6 p. m. (Rec., p. 43.) The message sent to the agent did not give any definite period to release crew, but simply said "release them." (Rec., p. 43.) They did not know, when they were released, how long they would be at Bowie. (Rec., p. 44.) The conductor testified that he did not know when he was going to be called (rec., p. 49) and that the release stated to be off until 11.40 a. m., until their engine got back, that they could not tell how long, and the operator told them they would be off duty until called. (Rec., p. 52.)

The chief dispatcher also testified that if released at Bowie for a definite period from 9.15 to 11.40 a. m. they would report again at 11.40 without being called (rec., p. 43) and that if he had wanted these men at Bowie to go to work before the 2 hours and 25 minutes were up he would have instructed the agent to call them (rec., p. 45), and that if he found that they were wanted at 10. a. m. he had a right to call them, but that he did not need them. (Rec., p. 46.) Conductor Sullivan testified that his train book showed that he was called to go to work at 11.40 a. m.; that they were called at 11.40 a. m. to go to work as soon as they could after that; that he did not know when he was going to be called (rec., p. 49); and that he did not know why they were released from 1.20 until 2.20 p. m. (Rec., p. 48.)

The engineer testified that he and his fireman got to Bowie at 1.30 p. m. and that they were given a release for at least an hour; that he had dinner,

smoked, and went out on the platform and went to sleep, and that some one came out on the platform and waked him up and told him that they were going to work at 2.30 p. m. and that they went back to their engine. (Rec., pp. 54, 55.)

At the close of the evidence the court sustained the motion of the plaintiff, requesting a directed verdict in its favor, and refused the motion of the defendant to direct a verdict in its favor, or, on its denial, to permit the case to go to the jury.

The defendant has brought the case to this court for review upon writ of error and has assigned as error the action of the trial court in granting the motion of the plaintiff and refusing that of the defendant for a directed verdict, as well as certain rulings made during the course of the trial relative to the admissibility of evidence. (Assignments of error, Rec., pp. 77 to 96.)

QUESTIONS INVOLVED.

I.

DID THE TRIAL COURT ERR IN DIRECTING A VERDICT FOR THE GOVERNMENT?

(Assignments of error XIII, XIV, and XV.)

II.

DID THE TRIAL COURT ERR IN THE EXCLUSION OF EVIDENCE AND EXHIBITS OFFERED BY THE DEFENDANT CARRIER?

(Assignments of error I, II, IV, V, VI, VII, VIII, IX and III, X, XI, and XII.)

I.

DID THE TRIAL COURT ERR IN DIRECTING A VER-
DICT FOR THE GOVERNMENT.

Whether this entire train crew was on duty in excess of the period fixed by the statute depends solely upon the determination of the question whether or not the so-called releases given them while en route are effectual to prevent the continuous running of their time of service.

This train crew was attached to this train as its crew until the final destination was reached.

Disregarding *at this time* the question whether such releases were for such short periods and at such places that they afforded no properly appreciable periods of rest and therefore did not avail to break the continuity of service, upon which ground the judgment below properly could have been justified, the Government contends that the judgment of the District Court may be sustained on the broader ground that when a train crew starts with a train to a designated terminal and has the duty of taking such train to that terminal it remains "on duty" within the meaning of the hours of service act, notwithstanding any temporary delays en route and regardless of any so-called releases en route unless the obligation to perform service on such trip is finally discharged. During the whole of the trip each one of the train crew is so attached to the train that his obligation to go on to the final destination

remains and he is therefore "on duty" within the meaning of this act.

Such releases afford none of the substantial protection which Congress intended when the eight-hour period available for rest was established in the act.

Railroading has always been recognized as a hazardous occupation. Operating trains has always been fraught with menace to the safety of employees and to the public.

The operation of trains by men who have had normal rest is not an easy task.

Congress has acted upon the basis that the continuous operation of trains for more than 16 hours is such a menace that it is to be no longer permitted.

But may a longer period be so split up into periods of service that the menace at which the law was directed may still remain without any violation of the statute?

Even if courts may feel compelled to say that the provisions of the statute permits aggregate service of 16 hours in a 24-hour period when such service is called for, assignments of duty to *different* trains, when such assignment of duty is to one particular train and such assignment continues more than 16 hours to bring that train to its final terminal, the device of a release to cover the time of detentions at stations en route ought not to be sufficient to prevent the application of the statute when by such continuous assignment to a particular train for such excessive time there is established a clear violation of the purpose and spirit of the law.

The record in this case shows that the releases were issued for the sole purpose of keeping this train crew on duty until the train reached its terminal or end of its run.

Operation of a train from its point of origin to its point of destination is a unit.

The duty to operate such a train from its point of origin to its destination is a unit.

The interims at points along the route are merely incidental.

The duty to continue and conclude the trip remains, and therefore employees while they remain the designated crew of a particular train while such train is on a trip are at all times on duty within the meaning of this safety statute.

II.

DID THE TRIAL COURT ERR IN THE EXCLUSION OF EVIDENCE AND EXHIBITS OFFERED BY THE DEFENDANT CARRIER?

As to exclusion of evidence and exhibits offered in behalf of the carrier, they may all be included under two headings, viz, (a) evidence tending to show good faith and diligence on the part of the carrier (assignments of error III, X, XI, and XII), and (b) questions calling for conclusion of the witness upon precise question presented for judicial determination (assignments of error I, II, IV, V, VI, VII, VIII, and IX).

(a) The good faith and diligence of the carrier are not in issue in cases under the hours-of-service act. The statute fixes a standard of duty and must be obeyed.

If there is any evidence of a violation, orders of the carrier showing efforts to prevent violation are immaterial and inadmissible.

In cases of this same general character, good faith and due diligence are not material.

Chicago, Burlington & Quincy Railroad v. United States (220 U. S., 559, and cases cited), and *Delk v. St. Louis & San Francisco Railroad Co.* (220 U. S., 580).

See also *Johnson v. Southern Pacific Co.* (196 U. S., 1).

(b) Nor was there any error in the exclusion of the conclusions of the witness on the precise question presented for judicial determination.

When the exact hour of beginning work and the hour of the final conclusion of all work, together with all the circumstances surrounding the so-called release, were before the court, upon facts which were without substantial dispute, the determination of the number of hours the employees in question were "on duty" within the meaning of this act became a question of law for the court, and the conclusion thereon by any witness was entirely immaterial and inconsequential.

Wherefore, it is respectfully submitted that there was no error in the rulings of the court below and the judgment should be affirmed.

THOMAS A. FLYNN,
United States Attorney.

PHILIP J. DOHERTY,
Special Assistant United States Attorney.

No. 2463.

**In the United States Circuit Court of
Appeals for the Ninth Circuit.**

THE SOUTHERN PACIFIC COMPANY, PLAINTIFF IN
ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN
ERROR.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

PHILIP J. DOHERTY,
Special Assistant United States Attorney.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1914

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E. D. [unclear]

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE SOUTHERN PACIFIC COMPANY, plaintiff in error, v. THE UNITED STATES OF AMERICA, defendant in error.	} No. 2463.
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ARGUMENT.

I.

The first point raised by the plaintiff in error is that there was evidence sufficient to require the court to submit the case to the jury. The complete reply to this contention of the plaintiff in error is that, in the case at bar, both parties asked for pre-emptory instructions. (Rec., p. 59.)

This amounts to a withdrawal of the case from the jury. *Beutell v. Magone*, 157 U. S., 154.)

II.

The plaintiff in error contends that the delay which caused the overtime service was excusable within the exception contained in the proviso, section 3 of the act, as being the result of a cause not known and which could not have been foreseen

before or at the time this train left its starting terminal.

This position is clearly untenable under facts recited in this record.

The record clearly shows that there was in this case no ^{casually,} unavoidable accident or act of God which intervened to ^{cause} ~~prevent~~ the overtime service. It is the contention of the Government that no causes other than the three above mentioned operate to relieve a carrier for excess service of its employees. It can not have been the intent of Congress to have recited three particular causes as exceptions to the act and then leave the entire act open to exceptions generally from *any* cause of any name or nature or of any character.

The reasonable construction of the proviso is that the three specific causes are excuses when not known and not possible to have been foreseen at the time a train left a terminal. Admitting that the causes in this case were not known and could not have been foreseen at the time this train left its starting terminal, they were the ordinary causes incidental to train operation, and as to such causes the proviso does not operate as an excuse.

III.

The releases in this case do not relieve the carrier from the liability created by the act. These releases were merely *pro forma*. The record shows this. On page 62 appears the telegram from the train dispatcher under which this so-called release was

given. It reads as follows: "As you have to use the local eng there will be no eng for local crews to work with release the local crews and call for when can give them an eng advise time released and recalled see it is as much as an hour so we can get credit for it."

And the telegram from the conductor on the same page does *not* indicate that the train crew was notified when they were released at Bowie at 9.15 that the release was until 11.40, but merely recites "Ext. 2813 west was released at Bowie at 9.15 a. m. Called to go to work at 11.40 a. m., released at 1.20 p. m. to go to work at 2.20 p. m." The difference between the form of the two releases as indicated in this telegram is to be noted.

Furthermore, the conductor's trip report (Rec., p. 63) shows "total time in service, 18 hours 55 minutes." This is also emphasized by the engineer's trip report (Rec., pp. 66 and 67), "*time on road, 18 hours 40 minutes.*" "*Claim continuous time from 6 a. m. to 12.40 a. m., or 18 hours and 40 minutes.*" (Rec., p. 67.)

That the release was given for the purpose of allowing the period covered by it to extend the time of service is shown in the testimony of William Wilson, the chief dispatcher (Rec., p. 39), "that I may consider the period they were released as being off duty."

Train Dispatcher Wilson also testified (Rec., p. 43), speaking of the first release: "That message did not tell them any definite period to release the

crew. It simply said 'release them.'” * * *

“ I don't know where they went or what they did, *only they must have remained at Bowie.*” “ If the release was definite from 9.15 a. m. to 11.40 a. m., they would report again at 11.40 a. m. without being called.” But the telegram of the conductor (Rec., p. 62) shows that they were *called* at 11.40 a. m., which would seem to indicate that the release was not definite, otherwise they would have reported without being called, according to the testimony of Chief Dispatcher Wilson.

This is more clear by the statement of the witness Wilson (Rec., p. 44): “ They didn't know when they were released how long they would be at Bowie * * * the release was given to cover the delays we saw would be encountered at Bowie.”

Again, on page 45, “ If I had wanted these men to go to work before the 2 hours and 25 minutes was up I would have instructed the agent to call them.”

To show that these men were on duty and subject to orders during the whole time covered by this trip, attention is called to the orders of Chief Dispatcher Wilson (Rec., p. 46): “ If I had found we wanted them at 10 o'clock I had a right to call them, but I didn't need them.”

Conductor Sullivan testified (Rec., p. 52): “ I did not receive any message at Bowie that I was released; the operator told me I would be off duty until called.”

As to the release of one hour to the engineer, B. F. Eaker, his statement that he received a mes-

sage "Release engineer and fireman for *at least* one hour " does not seem to establish a release for a fixed and definite period.

While there may have been some difference in the statements made by some of the witnesses as to the definite or indefinite nature of the release and as to whether or not there was a definite time fixed at the time the release was given for the men to again go on duty, the case having been submitted to the court by the request of both sides for peremptory instructions, the finding of the court on the questions of fact involved, where there was *any* evidence to justify it, is conclusive, and can not be reviewed here.

The first telegram from the train dispatcher (Rec., p. 62) places this case squarely under the decision of the Supreme Court of the United States in *Missouri, Kansas & Texas Railway v. United States* (231 U. S., 112).

But assuming *for the purpose of argument only* that there was a definite release given, as claimed, to the engine crew and train crew for the respective periods mentioned, it is respectfully submitted that such temporary releases are not effectual to break the continuity of service of train employees while attached to the train in the course of its journey from one terminal to another.

In this case there is a mere transient absence from the train, with the intention of returning and continuing duty thereon.

It is the ordinary case of employees who stand ready and willing to complete a duty set before them, which they are prevented temporarily from actively continuing by the master, who thereby enlarges the period within which duty must be performed. Their continued readiness to perform the specified service is equivalent to actual performance.

They remain under orders; that is, under orders to wait and be in readiness at the time appointed, if there is a definite time given in the release. It was merely a time during the trip when conditions were such that there was no actual work to do. They simply waited until the time for the actual resumption of work.

The intervals were not advantageous or restful. They were prejudicial and increased instead of lessened the burden of carrying the train on to its destination.

The New York Supreme Court, in the case of *People v. Erie Railroad Company* (198 N. Y., 369; 91 N. E., 849, p. 851), said: "It not infrequently happens that the *lack of active occupation* during hours of duty is *more trying* than work itself." This dictum is merely expressive of that which is of general knowledge. The burden of waiting and the strain resulting therefrom is ordinarily so trying that it can not be presumed that Congress intended to permit that there should be superimposed upon the service of 16 hours the

burden, the strain, and the duty to wait during other periods of time as an additional duty.

Such releases do not release—they detain. They do not result in rest, but in added burden.

It is a continuous duty until the full duty of the trip is performed. While a train crew is detained for further duty yet to be performed they are on duty within this law.

The words “for a longer period than 16 hours” includes the initiation of work, attachment to and service upon a given train, obedience to all orders, and to final release from all duty after $17\frac{1}{2}$ hours, as in this case, although there were orders which called for no active performance of duty during the delay incidental to the trip caused by no casualty, unavoidable accident, or act of God.

The nexus which binds a train crew to its train and to continuous duty until officially released is not broken by temporary permitted absence from the train while en route. Such releases as are here involved only increase the time of the performance of duty. Time is added. Relief is delayed. The passage of longer time of making the trip makes duty more arduous. Work is extended for a more wearying period. There must be a greater physical and mental strain. The opportunity for a restful period of sleep is postponed. The purpose of the act is violated.

Indeed, the act would be of little value and of little relief from the dangers which it was enacted to prevent if the contention of the plaintiff in error

was sustained. (*North Carolina Railroad Co. v. Zachary*, 232 U. S., 248.)

In the case just cited one of the headnotes is as follows: "Although absent temporarily from his train for a short time for a purpose not inconsistent with his duty to his employer, a railroad employee may still be on duty and engaged in interstate commerce within the meaning of the Employers' Liability Act of 1908," and Pitney, Justice, delivering the opinion of the court, on page 260 said:

There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary or was inconsistent with his duty to his employer. It seems to us clear that the man was still "on duty" and employed in commerce, notwithstanding his temporary absence from the locomotive engine. (See *Missouri, Kansas & Texas Railway Co. v. United States*, 231 U. S., 112, 119.)

In 5 Labatt, Master and Servant, 52, 53, it is said: "It can not be said that a conductor is not in charge of a train during a temporary absence therefrom," citing 133 Mass., 356; 182 Mass., 237.

Judge Maxey, in *United States v. St. Louis South Western R. R. Co.*, 198 Fed., 954, speaking of this statute, said:

It is not within the power of a carrier by means of shifts and evasions of any kind or character to nullify a statute obviously intended as was the present act to promote the safety of employees and of the traveling public.

It is therefore contended that the period of service of train employees can not be extended beyond the period of 16 hours by the mere device of releases at such times as the train is delayed by the usual causes incident to operation.

In the case of *United States v. Southern Pacific Co.*, 209 Fed., 562, the Eighth Circuit Court of Appeals, referring to its opinion in the case of *United States v. Kansas City Southern*, 202 Fed., 828, said: "*If the usual causes of delay incident to train operation were to excuse, then the statute would be wholly ineffective to accomplish its purpose.*"

If delays under such circumstances do not excuse, why should an *order to delay* under such circumstances excuse?

A release of the character in question here is a mere order to wait or to delay.

It is respectfully submitted that such a device can not be operative to extend to more than 16 hours the period within which duty is required on the part of a train or engine crew of a train en route to its fixed destination.

This court, in the case of *Great Northern Railway Company v. United States*, dated February 24, 1914, said: "Tying up on a siding for any purpose, whether to await orders or for the passing of other trains or for any other purpose connected with the transportation of freight or passengers, *is as much a part of the general movement of a train as the actual running thereof* on the main line and at scheduled periods. * * * *Such delays are a*

part of the general operations whereby traffic over railroads is conducted." (211 Fed., 309.)

IV.

As plaintiff in error has not argued in its brief the exceptions and assignment of errors arising out of the exclusion by the district court of certain exhibits and evidence, it may be concluded that these exceptions and assignments are waived.

In any event there was no error in excluding the evidence in question. The exclusion of testimony as to whether or not these employees were *on duty* during the time covered by the release was justified, as this was the *ultimate fact* involved in the case.

A question which calls for the opinion of a witness as to the ultimate fact which is in issue is properly excluded.

Keefe v. Armour Co., 258 Ill., 28; 101 N. E., 252; Ann. Cas. B., 1914; B-188 and cases cited in note. Also note to *Hammond v. Woodman*, 66 Am. Dec., 219, 230; *Martin v. Des Moines Edison Light Co.*, 131 Ia., 739; 106 N. W., 359.

For all the reasons herein set forth the plaintiff in error contends that there was no error in the rulings of the district court.

Respectfully submitted on behalf of the defendant in error.

PHILIP J. DOHERTY,
Special Assistant United States Attorney.

No. 2463:

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR:

FRANCIS M. HARTMAN,
CHAS. J. HEGGERTY,
KNIGHT & HEGGERTY,
Attorneys for Plaintiff in Error.

OCT 29 1914

F. D. Moulton,

No. 2463:

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR:

STATEMENT OF THE CASE:

This Writ of Error is brought by the Southern Pacific Company as Plaintiff in Error, *to reverse a Judgment of the District Court of the United States for the District of Arizona rendered upon a directed verdict against the Southern Pacific Company, upon the first six Counts of the Complaint, and imposing penalties totalling \$402, being \$1. on Counts 1 and 2, of the Complaint, and \$100. each*

on Counts 3, 4, 5 and 6, for alleged violation by the Southern Pacific Company of Sections 2 and 3, of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by *limiting the hours of service of employees thereon*," Approved March 4, 1907 (34 Stat. L. p. 1415).

Sections 2 and 3 of this Act are as follows:—

"Sec. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or *permit* any employé subject to this act to be or *remain on duty* for a longer period than sixteen *consecutive* hours, and whenever any such employé of such common carrier shall have been *continuously on duty* for sixteen hours he shall be *relieved* and not required or permitted again *to go on duty until* he has had at least *ten consecutive* hours off duty; and no such employé who has been on duty sixteen hours *in the aggregate* in any twenty-four-hour period shall be required or *permitted to continue* or again go on duty without having had at least *eight consecutive* hours off duty:

"Sec. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any employé to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jur-

isdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: Provided, that the provisions of this act shall *not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen."*

The Complaint contains *twelve* Counts, but the *only* Counts involved upon *this* Writ of Error are the *first six* (Tr. 1 to 7); the *Answer* to these *first six* Counts (Tr. 15-24) denies any violation of this Act; and sets up an Affirmative defense to the *last six* Counts, to which the Government *demurred*; the Court *overruled* the Government's *demurrer* to the *Affirmative defense* set out in the Answer of Plaintiff in Error to the *last six* Counts (the facts as affirmatively therein stated being conceded by the Government to be true), and the Government, Plaintiff in Error and the Court consenting, the

sole question on these *last six* Counts was treated as one of law, and the Court rendered judgment *for* the Defendant, and from the Judgment on these *last six* Counts the Government has taken a Writ of Error upon a *Separate Record* (No. 2443).

The particulars of the charge in these *first six* Counts involve the hours of service of a train crew consisting of the Conductor Sullivan, Engineer Eaker, Fireman Kempf and trainmen Brown, Peacock and Harrison, all of whom lived at Benson, (Tr. p. 44, p. 53), during the *run of regular local freight* train (Tr. p. 37 & p. 51) Extra West, Engine No. 2813, December 21, 1912, from Lordsburg to Benson (Tr. p. 31), placed on duty at Lordsburg at 5:30 A. M. and left at 6 A. M. December 21, 1912, with *Benson* as the *final destination* of (Tr. p. 51) that train; Engineer and Fireman finally relieved at Cochise, at 10:29 P. M.; train *arrived* at Benson and remainder of Crew were relieved at 12:40 A. M. December 22, 1912; time *on road* 15 hours, total time in service of Conductor and trainmen 19 hours and 10 minutes, and 16 hours and 59 minutes as to Engineer Eaker and Fireman Kempf (Tr. p. 1-3); *Schedule* time 10 hours; miles run 115 (Tr. p. 63-67).

The evidence on the trial (all introduced by the Government) shows a *break in service* of the Conductor and three brakemen, who, during this run from Lordsburg to Benson were relieved at *Bowie* at 9:15 A. M. until 11:40 A. M. (2 hours and 25

minutes), as it was *necessary* to use their Engine for other service and their train was on a siding (Tr. p. 32); Engineer and fireman with their Engine were *helping another train up the hill* from Simon to Steins (Tr. p. 39, and p. 40) and were released when they arrived at Bowie at 1:30 P. M. until 2:30 P. M. (p. 39); the train was pulled into Bowie by another Engine (p. 40), another engine crew relieved them at Cochise, and they dead-headed thence into Benson (p. 40, 41); and the Conductor and trainmen were *relieved again* at 1:20 P. M. until 2:20 P. M. (1 hour), a total period of relief from service of 3 hours and 25 minutes, while the time of *over service* was *only* 3 hours and 10 minutes; deducting these two periods of relief from duty, these members of the crew (Conductor and three trainmen) were thus on duty for a period *not exceeding sixteen* consecutive hours (Tr. p. 31-33), viz: 15 hours and 45 minutes; the *Engineer and Fireman* were on duty from 5:30 A. M. to 1:30 P. M. when they were *relieved* from duty at Bowie from 1:30 to 2:30 P. M. and were *finally* relieved at Cochise at 10:29 P. M., making the period of duty of Engineer and Fireman 15 hours and 59 minutes, a period of *less than 16* consecutive hours (Tr. p. 33-34).

The evidence in the case, and all of this evidence introduced by the Government, is very clear that these men were *relieved* from duty for a *definite period* from 9:15 to 11:40 A. M. and for a *definite*

period from 1:20 to 2:20 P. M. (1:30 to 2:30 Engineer and fireman); that during that time they were not engaged in any way in the movement of the train or expected to or doing any work, they were free to do what they pleased, and did what they pleased, and as the evidence shows were actually resting. (Tr. p. 31-63).

The Court granted the Motion of the Government, and *directed a verdict* in favor of the Government upon these *first six* Counts (Tr. p. 59).

ASSIGNMENTS OF ERROR:

Plaintiff in Error relies upon the following Assignments of Error:—

1—.Assignment of Error “8” (Tr. p. 82); the Court struck out and excluded from the jury the testimony of the Conductor that he “*was off duty*” during the period testified to by him (Tr. p. 48); such testimony being a question of fact which should have been submitted to the jury.

2—.Assignment of Error “9” (Tr. p. 82, 83); the Court sustained the Government’s objection to the question put to the Engineer (Tr. p. 56), whether he or his fireman was required or permitted to be or remain on duty for a longer period than 16 consecutive hours, to-wit:— from 5:30 A. M. until 10:29 P. M. on December 29, 1914, the same being a question of fact to be submitted to the Jury.

3—.Assignment of Error “13” (Tr. p. 88-91); the Court granted the Motion of the Government

that the Jury be directed to return a verdict in favor of the Government upon these *first six* Counts of the Complaint.

4—.Assignment of Error "14" (Tr. p. 91-93); the Court denied the Motion of Plaintiff in Error that the jury be directed to return a Verdict in favor of the Plaintiff in Error on these *first six* Counts of the complaint; and that the questions of fact should have been submitted to the jury for their Verdict.

5—.Assignment of Error "15" (Tr. p. 93); the Court granted the Motion of Defendant in Error and denied the Motion of the Plaintiff in Error, for a directed verdict upon these *first six* Counts; and that the case should have been submitted to the jury. (Tr. p. 95-96)

ARGUMENT

I

FIRST:—THE MEMBERS OF THIS TRAIN CREW WERE RELEASED FROM DUTY DURING A PERIOD OF THREE HOURS AND TWENTY-FIVE MINUTES, UNDER CIRCUMSTANCES WHICH BROKE THE CONTINUITY OF THE SERVICE WITHIN THE MEANING OF THIS ACT; THIS PERIOD OF RELEASE MUST BE DEDUCTED FROM THE ENTIRE TIME CONSUMED IN MAKING THE TRIP FROM LORDSBURG TO BENSON, VIZ: 19 HOURS AND 10 MINUTES, AND SO DEDUCTED LEAVES THE ACTUAL PERIOD OF SERVICE ONLY FIFTEEN HOURS AND 45 MINUTES.

The charge is simply one of the *overtime service* of this train crew of this local freight train running between Lordsburg and Benson, whose *homes* were in Benson, and who had been *released* from duty for the *definite* periods of *two* hours and 25 minutes and *one* hour, a total of *three* hours and 25 minutes during this run; there is *no* charge that this crew did not have the amount of legal rest, nor any charge that they again went on duty without sufficient previous rest, *nor* any charge of negligence or fault of any kind on the part of the company; nor is it claimed or even pretended by the Government that *any one* of this train crew was on duty or in any manner connected with the movement of this train or any other service of the Defendant during the time embraced in these two definite periods of release from duty.

THE EVIDENCE

The evidence in the case, all introduced by the Government, consists of the *undisputed* testimony of the *Conductor* and *Engineer*, testimony of the *Chief Dispatcher* at Tucson, and records of the Company relating to this train and its crew from terminal to terminal, Lordsburg to Benson (Tr. p. 30-59), is as follows:

Sullivan, the Conductor, testified (Tr. p. 47-53):—"We left Lordsburg at 6 A. M. arriving at Bowie at 9:15 A. M. Was *released* at Bowie at 9:15 to 11:40 A. M. two hours and twenty-five minutes; was *released* at Bowie at 1:20 P. M. to go to

work at 2:20 P. M. I was sitting around Bowie, sitting around reading during this time, and from 2.20 on I got my train together and got ready to leave town. The delay report shows a number of delays there. Delay by other trains. Letting passenger trains by, waiting for another engine five hours and fifteen minutes, taking water, lunch, blocked by other trains so we could not get out. We were blocked by these other trains after we went to work. We were blocked after we went to work, after 2:20 and were delayed from 2:20 P. M. to 6:00 P. M. by these various causes. I don't remember what prevented us from getting out at 1:30 when engine 2813 got back. I didn't know why the release from 1:20 P. M. to 2:20 P. M. was given us. The operator gave us the release. *The operator said you are released for one hour.* The operator did not say why. We could not have gotten out of the yard at 1:30 because we were blocked. *The operator also gave us the release of two hours and twenty-five minutes, which was verbal.* The operator told me I was released until 11:40 A. M. If I remember right, *he didn't say released until called;* he said released until 11:40 A. M. When the release was given us from 9:15 to 11:40 *they are supposed to call us after the time of the release and we are off until we are called.* From 9:15 to 11:40 I was around the hotel there reading and the brakemen were in the caboose and around the hotel and sitting under the trees. We were *released* that morning according to my train book

for that length of time. The train book shows released at Bowie at 9:15 A. M., called to go to work at 11:40 A. M. They called us at 11:40 A. M. *to go to work* as soon as we can *after* that. According to my train book *we went off duty* at 9:15 A. M. I didn't know when I was going to be called. I was not doing anything during the two hours and twenty-five minutes, only just staying round the hotel. *I didn't perform any duty for the company during that time. I knew when I was released at 9:15 that I would not have to go back to work until 11:40 A. M., and during that time I could do as I pleased. I could have gotten into an automobile and gone out in the country and got back at 11:40 and would have been in the clear and so would the brakeman. I had a right to go and come as I chose—we were free. Our time was absolutely our own from 9:15 a. m. until 11:40 A. M., and that applied to the brakemen too. From 1:20 P. M. to 2:20 P. M. we were relieved for one hour. We had to be back after that one hour, and when we were relieved at 1:20 we knew we did not have to go back to work until 2:20 P. M. We were not waiting around expecting to go to work during that period. Our time was absolutely our own during that time. That applied to the brakemen too, and we do as we like. We were free to come and go as long as we were back at 2:20, and we were not working for the company during that time and neither were the brakemen. Our regular engine was used to help a train from Simon to Steins. I think it is about*

thirty miles from Steins to Bowie. Mr. Eaker and Mr. Kempf were running that engine. I knew that we could not go out until that engine came back. I think that engine got back at 1:20 P. M. and that is when they released us again. This train which I had was the regular local between Lordsburg and Benson. The regular run was from Lordsburg to Benson and *the termini* for that train were Lordsburg and Benson. When we left Lordsburg we expected to go to Benson that day. Mr. Kempf and Mr. Eaker, the engineer and fireman, didn't go all the way through. They stopped at Cochise at 10:29 P. M. because their sixteen hours was up. We (the train crew) had plenty of time to go on to Benson and we had got another engineer and fireman at Cochise. They came from Benson. *The company did not have any extra engineers and firemen at Cochise*—had to send them out from Benson. They used the same engine to pull the train into Benson. We were delayed at Bowie 5 hours and 15 minutes waiting for the Engine, 25 minutes for No. 9, 10 minutes for No. 10, 2 hours switching, 40 minutes blocked by No. 32, 30 minutes by Extra 2759, and 20 minutes blocked by passenger train.

“When this release was given at 9:15 it stated that we were to be off duty until 11:40. Until our engine got back. We could not tell how long we would be off. I was figuring we could get in was the reason I didn't send the message to the dispatcher until after we left Bowie. The reason I

didn't wire him at Bowie is because the Dispatcher knew we was off at Bowie. We generally called his attention to it. It was not necessary to wire the dispatcher from Bowie. I had no occasion to wire the dispatcher from Bowie. I did not receive any message at Bowie that I was released; the operator told me. I would be off duty till called.

“(Witness reads from train book at the request of Counsel for plaintiff:) “Released 9:15 A. M., called to work 11:40 A. M., released 1:20 to go to work at 2:20.”

“When we were released at 9:15 to go to work at 11:40 it is the custom to call us at 11:40 whether release is for a definite or indefinite period.

“I stated I was released at Bowie at 9:15 and called to go to work at 11:40. I am referring to my train book which states that the release—that I was released at 9:15 and called to go to work at 11:40. My understanding was that I was *released until* 11:40. I was released at 9:15 until 11:40. The operator said that to me when he released me.

My home at that time was at Benson as well as the other members of the train crew, also the engineer and fireman.

“There is a hotel at Bowie, a store, restaurant, reading-room, newsstand and billiard-room. There is a hotel at the depot where we can get sleeping accommodations.

EAKER, the Engineer, testified (Tr. p. 53-56) :

"In December, 1912, I was running on the Southern Pacific on the Benson to Lordsburg local. I was the engineer on Extra West, Engine 2813, on December 21, 1912.

"Referring to this time slip I came out of Lordsburg on this trip on engine 2813 to San Simon, from San Simon back to Stein's and ran light from Steins to Bowie. I got back to Bowie at 1:20 P. M. When I got back I ate dinner and purchased a cigar and smoked and then went out on the platform and went to sleep. Myself and my fireman ate dinner as soon as we got back. *There was a release given us.* I don't remember who gave it to us. I don't think he said anything to me. *He gave me a message releasing the engineer and fireman for at least one hour.* Someone came out on the platform and waked me up and told me we were going to work at 2:30 and we went back to our engine. From that time on we were switching in the yard at Bowie for a number of hours and we were released at 10:29 P. M. at Cochise. Mr. Kempf was my fireman during this time.

"Myself and Mr. Kempf left Lordsburg with our engine on that train and arrived at Bowie at 1:20 P. M. We stopped with the engine before we got to Bowie at San Simon. Our engine was the regular engine for that train. We were supposed to take that train clear through to Benson with that

engine. When we got into Bowie at 1:30 we received this message relieving us for one hour and when we received this message we knew that we would not have to go to work until that hour expired. During that time we were not expected to go to work. We could do what we pleased during that hour and we did do what we pleased. The hour was absolutely ours and we were not to perform any duty for the company during that time. I ate lunch, smoked a cigar and laid down and took a nap and got rested and someone woke me up and we went and got on our engine and went to work, switched around the yard awhile and then went to Benson. Our time was up at Cochise at 10:30 P. M., and we were relieved there at Cochise at 10:29 P. M. We quit work right there at Cochise and did not work any longer on that trip. Another engineer and fireman, Engineer Wilson and Fireman Houston, deadheaded out from Benson to Cochise and relieved us at Cochise. They were on our engine ten or fifteen minutes before our time was up waiting to relieve me. They got on our engine ten or fifteen minutes before our time was up. At 10:29 I climbed down off the engine and went back to the caboose of the train and went to bed and deadheaded on that train into Benson, and the fireman also. Neither of us worked any more after 10:29 on that trip."

WILLIAM WILSON, Chief Dispatcher at Tucson, testified (Tr. p. 30-47) :

"I have been chief dispatcher at Tuscon for six years. My duties as dispatcher are to keep a record of train and engine men, as to the time that they are called and the time that they are released or go off duty, fill orders for cars, keep a record of the engines and cars, see that passenger and freight trains make time and in general everything pertaining to the hours of service of train men and engine men. In December, 1912, the trains between Lordsburg and Benson were in my jurisdiction. (Witness here identifies train sheet handed him by counsel for plaintiff.) This train sheet shows the train number, crews of the trains, conductors, engineers, firemen, engine number *the time they were called and relieved at different points*. This train sheet was started at 12:01 A. M. and all trains starting on their run at or after 12:01 A. M. are kept on this sheet until they have finished their run. This train sheet is made by the train dispatcher who is under my jurisdiction and under my orders. This is an official record of the company. (Witness identifies another train sheet handed him by counsel for plaintiff.) This train sheet shows train extra, engine No. 2813, December 21st, 1912, which was a *local freight train running between Lordsburg and Benson*. The employees on that train were called to leave on the morning of December 21st, 1912, for six A. M., which placed them on duty at 5:30 A. M. Mr. B. F. Eaker, Mr. Frank H. Kempf, Mr. B. T. Sullivan, Mr. W. E. Brown, Mr. H. F. Peacock and Mr. C. G. Harrison were the employees

engaged in connection with the movement of this train. They had orders to take that train to Bowie when they reported at 5:30 A. M. When they started with that train from Lordsburg their objective point was Benson. *Benson* was the *final* destination of the train.. It arrived at Benson at 12:25 A. M. December 22d, 1912. Only a part of these employees were still engaged in and connected with the movement of this train when it arrived at Benson, Conductor Sullivan and Brakemen Brown, Peacock and Harrison, and they were *released from all service* in connection with that train on December 22d, at 12:40 A. M. This train sheet does not show that they were in continuous service from the time they reported at Lordsburg until they were relieved at 12:40 A. M. December 22d. It shows *a break in the service* with respect to the conductor and the three brakemen. It shows that *they were relieved at Bowie* at 9:15 A. M. until 11:40 A. M. and *again* at 1:20 P. M. until 2:20 P. M. and the balance of the time outside of these two releases they were in continuous service. The purpose of the first release at Bowie from 9:15 A. M. to 11:40 A. M. two hours and twenty-five minutes, was that it was necessary to use their engine for other service and their train was on the siding at Bowie, so far as I could say. This release was sent to the men by a message to the agent at Bowie. The agent is supposed to have delivered the message, he is the one in charge of that. We kept this message in the office of the chief dispatcher. (Witness here

identified copy of message handed to him by counsel for the plaintiff, which document was thereupon offered in evidence by plaintiff, admitted and marked Government's Exhibit "A", and which is hereinafter fully set forth.) This message was signed by dispatcher Glenn. He was on duty at that time. "W. H. L." referred to in this message is W. H. Lawrence, Agent at Bowie, and the initials "W. W." are my initials. The notation on the train sheet that these employees were relieved from 9:15 to 11:40 was made from the message received from the conductor. That notation was made by dispatcher Glenn, who was on duty at that time from eight in the morning until four in the afternoon. I have a copy of the message signed by the conductor to the dispatcher. (Witness here identifies copy of message handed him by counsel for plaintiff, which was offered in evidence by the plaintiff, and admitted and marked Government's Exhibit "B", and which is hereinafter fully set forth.) The letters "Bo." on this message is the call for Bowie, and it shows that it was received at 1:58 P. M. by "G."—by Mr. Glenn. I don't know what character of release was given to the conductor and brakemen at Bowie. There was a *message sent* to the conductor at Bowie, *relieving* the conductor and brakeman *from* 1:20 P. M. to 2:20 P. M. but no copy of this message was retained. I could not at this time say positively what the purpose of that release was. I did not make any report that this hour was allowed them for dinner. The *engineer and fireman*

of this train were *finally relieved* at 10:29 P. M. December 21, 1912, at Cochise.

“The *engineer and fireman* of this train, B. F. Eaker and Frank H. Kempf, were *released at Bowie* at 1:30 P. M. to 2:30 P. M. The record does not show for what purpose. Outside of that one hour for which they were released at Bowie, they were in continuous service from 5:30 A. M. to 10:20 P. M. That release to the engineer and fireman was sent over the wire in the form of a message, I could not say to whom it was addressed, but it was sent by some one in the office of the Chief Dispatcher—Mr. Glenn—I know I told the dispatcher, Mr. Glenn to send it. The notation here on the train sheet of the engineer and fireman being relieved one hour at Bowie, from 1:30 to 2:30 P. M., is made in the handwriting of Patrick Flynn, a dispatcher who came on duty at four P. M.

“This is the train sheet showing train extra west—shows the number of the train, the number of the engine on the train, the conductor’s name—it shows that the train was called to leave Lordsburg at 6:00 A. M., and shows the time it arrived at Bowie, and the time they were relieved and went on duty again at Bowie, the time the engine crew was released at Cochise and the time the train crew was released at Benson. *The trainmen and the enginemen are directly under me as to when they shall leave a terminal and when they shall be relieved.*”

"The regular run of this train referred to Extra West, Engine No. 2813, December 21, 1912, was from Lordsburg to Benson. It was a local freight train.

"When this train reached Bowie the conductor and three brakemen were relieved from duty from 9:15 A. M. until 11:40 A. M. From the time that they went on duty at 5:30 A. M. at Lordsburg, until they were relieved at Bowie, at 9:15 A. M., is three hours and forty-five minutes, and they were relieved from 9:15 A. M. to 11:40 A. M., two hours and forty-five minutes. During the time that they were relieved, two hours and twenty-five minutes, they were in the town of Bowie. From 1:20 P. M. to 2:20 P. M. they were also relieved at Bowie one hour. They were at Bowie altogether five hours and five minutes. They reported at 2:20 P. M. to go to work and worked from 2:20 P. M. to 12:40 A. M., December 22, 1912.

"From 5:30 A. M., when the men were considered on duty at Lordsburg, until they were finally relieved, counting out the two hours and twenty-five minutes and the one hour's time they were relieved at Bowie, would be fifteen hours and forty-five minutes, and in that fifteen hours and forty-five minutes is included the time that they were on duty at Bowie from 11:40 to 1:20 P. M., one hour and forty minutes.

"I issued instructions that the train crew be released from 9:15 A. M. to 11:40 A. M. and from

1:20 P. M. to 2:20 P. M., and *I issued instructions* that the engine crew be *released from 1:30 P. M. to 2:30 P. M.* that I may use that time to get them as near to Benson as possible; that I may consider the period they were released as being off duty. Mr. Eaker's engine did not bring the train into Bowie. *Mr. Eaker with his regular engine was helping another train from San Simon to Steins, and returned from Steins to Bowie arriving at Bowie at 1:30 P. M., and was released from 1:30 P. M. to 2:30 P. M., one hour.* When *Mr. Eaker and his fireman* arrived at Bowie at 1:30 *he was released.* He was *not required to perform any duty for the company from that time until two-thirty P. M.* When the *train crew was released at 9:15 A. M. until 11:40 A. M.,* at Bowie, they were *not required to perform any duty whatever for the company during the two hours and twenty-five minutes.* They were *not required to do anything for the company* either during all the time from 11:40 to 1:20 P. M., while they were on duty. They were not required to do anything for the company from 1:20 P. M. to 2:20 P. M. *They could go and come and do as they chose. Their time was their own. They were not waiting around expecting to be called and to go on duty during the periods of time they were released.* That applied to both periods as to the train crew, from 9:15 A. M. to 11:40 A. M., and from 1:20 P. M. to 2:20 P. M. When this train reached Simon Mr. Eaker and Mr. Kempf took their engine and turned around and went

back to Steins helping another train up the hill. They then came back to Bowie and caught up with their train there. The train was pulled in from Simon to Bowie by another engine. When Mr. Eaker and Mr. Kempf got back to Bowie with their regular engine they took the train with it. I stopped Mr. Eaker and Mr. Kempf before they got to the end of their run on account of the sixteen hour law and relieved them at 10:29 P. M., at Cochise Station. Cochise is not a terminal and was not the terminal for that train and was not the end of the run for that train. I relieved them at that place at 10:29 P. M. to comply with the sixteen hour law and to keep them from working longer than sixteen consecutive hours. In order to get the train into Benson to the end of this run it was necessary to deadhead another engine crew from Benson to Cochise, to relieve Engineer Eaker and Fireman Kempf. Neither Mr. Eaker nor Mr. Kempf performed any duty whatever for the company after 10:29 P. M. that night. They deadheaded from Cochise into Benson. I have been to Bowie. They were relieved at Bowie and remained there and could have obtained food and rest and recreation, at least I have gotten them there myself.

“The engineer and fireman were *not relieved* by me from 1:30 P. M. to 2:30 P. M. *to eat*. My instructions were not to that effect. Neither were the conductor and brakemen relieved for that purpose.

"The *release* of one hour was *not* given to the engine crew and train crew for the purpose of allowing them *to eat*. It was given for the purpose so it could be used as being off duty and working them to get them nearer to Benson. I cannot state now what the conditions were in the yard at Bowie or in the roundhouse as to necessitate giving that release of one hour. I could not refer to any records which I have to ascertain that information. The agent at Bowie possibly would have such records. I sent these release messages or authorized the messages sent. So far as I can recall *it was on account of conditions*. It was not known exactly when we could get them out. *The train did not leave Bowie until six P. M.* They were there switching around and meeting other trains. The reason the first release was given to the train crew for two hours and twenty-five minutes was, at that time it looked as though the engine would be back to Bowie and start work about 11:40. The message was addressed to the roundhouse foreman and to the agent at Bowie. That message did not tell them any definite period to release the crew. It simply said, "Release them." I don't know just what the conditions were to make the release just 2 hours and 25 minutes, from 9:15 to 11:40 A. M. these men were not under any responsibility at all. I don't know where they went or what they did, only they must have remained at Bowie. If the release was definite from 9:15 A. M. to 11:40 A. M., they would report again at 11:40 A. M. without being called.

From 11:40 until the next release went into effect the men were still at Bowie under instructions from me, but they were not working. I could not say whether or not they reported at 11:40 A. M. *When the train is in the yard limits the agent has charge of matters of that kind.* There is also a company watchman to look after the train. If the men were not released for a definite period and had to be called to go on duty again the agent would have the yard clerk call them. He would simply have to hunt them. There is no way for them to get out of town; they would have to stay in Bowie. They didn't know when they were released how long they would be at Bowie. At the time the last release of the whole train crew for one hour a local freight train going east arrived at Bowie at 2:15 P. M. They (the train crew released) couldn't have gotten out; they would have to stay there to meet every train so far as that train was concerned. They did all their work switching in the yard after 2:30 P. M. I can't say why they did not do it between 1:20 and 2:20; possibly the engine might not have been ready. When their engine got in there to Bowie, as a rule they took oil and water and sometimes the roundhouse foreman will do a small job on the engine, but in this case I can't say what work there was to do on the engine. The local crews and probably other train crews on the slow train had lunch at Bowie and also at one or two other places, but I cannot say whether these men had their lunch there at that time. Sometime the

men carry their lunches with them in the caboose. In this case I would say that *these men lived in Benson*. If conditions had been normal at Bowie at that time this release would not have been given. The release was given to cover the delays which we saw would be encountered there at Bowie. They had a lot of switching to do.

“The engine crew which was deadheaded from Benson to Cochise took this same engine at Cochise. As well as I remember they went over on passenger train No. 8. Ordinarily that train arrived at Cochise, at 10:15 P. M. I don't know what time Extra West, Engine 2813, passed Cochise because the office at that place was closed at night. It is the duty of the train dispatcher when he gives a release to note the same on the train sheet when he gets a message from the parties who have been released. He writes it on the train sheet when he gets a message from them. We always try to get a message from them for the record. If I had wanted these men at Bowie to go to work before the two hours and twenty-five minutes was up I would have instructed the agent to call them. There is an address book of all trains and engine-men at Tucson and at all other places where they go off duty. When they are wanted they are called provided they have had their rest. At other places ordinarily they are in the caboose. There was no address book at Bowie. In case they were wanted it would have been necessary to send out and notify them. *I could not have cancelled that release until I had*

gotten the word to the men. If I had found we wanted them at ten o'clock I had a right to call them, but I didn't need them.

“EXAMINATION BY THE COURT.

“I cannot state just what the cause of the delay was at that time at Bowie, but Bowie is quite an important interchange point, especially in the winter time, and becomes congested; that is, a great many trains pass through there and there may be not enough engines to handle them, and the helper engine may have other work so that we would have to take one of these crews to handle some freight train. As well as I remember, it was owing to the *condition of the yards and the weather* that required the trains to stay there so long. The only records we have is the delay reports.

“*During the two hours and twenty-five minutes this train crew was relieved at Bowie from 9:15 A. M. to 11:40 A. M., they were not waiting around expecting to be called or to have the release changed on them.* In case it had become necessary for any good reason and occasion demanded it to have changed the period of release and we had called these men to go to work before 11:40 A. M., I would have had to issue instructions to the agent as to what time I wanted them and he would have endeavored to get them, and if he had not been able to get them started to work at the time specified he would then have advised me. If the agent could not have found the men the call would have had

to have been changed and the men would have been subject to no reprimand on that account. *They had a right to go out into the country if they wanted to, as long as they showed up at 11:40 A. M., and I had no right to change the time of the release on them unless I could get hold of them.*"

These *two* periods, viz:—from 9:15 to 11:40 A. M. 2 hours and 25 minutes, during which the *Conductor* and *three* trainmen were *relieved* from duty at Bowie, for this *definite* period of time, should upon a fair, legal construction of Sections 2 and 3 of this Act, be deducted from the period of actual service of these members of that train crew; and as the total period between 5:30 A. M. when they went on duty and 12:40 when they were *finally relieved* from duty at their destination terminal—Benson, was 19 hours and 10 minutes, such deduction would reduce that period to 16 hours and 45 minutes; they were *again relieved* at 1:20 to 2:20 P. M. for a definite 1 hour, thus further reducing the period charged by the Government to 15 hours and 45 minutes, and making the *aggregate* of their service *less* than the permitted 16 consecutive hours.

The Engineer and Fireman were relieved at Bowie for the definite period of 1 hour, from 1:30 to 2:30 P. M., and were *finally relieved* from duty at Cochise, at 10:29; so that, as the Engineer and Fireman went on duty at Lordsburg at 5:30 A. M.

and were finally relieved at Cochise at 10:29, and this 1 hour release should be deducted, their period of service was only 15 hours and 59 minutes.

The Government does not charge nor is there any claim that any of this train crew went again on duty without having had the required period of previous rest; the charge is simply one of *over-service*, 19 hours and 10 minutes as to the Conductor and three trainmen, and 16 hours and 59 minutes as to the Engineer and Fireman; while the Plaintiff in Error claims and proved a release from duty for the definite period of 3 hours and 25 minutes as to the Conductor and three trainmen, and 1 hour as to the Engineer and Fireman, making the *aggregate* period of service of the *whole* crew *less* than the 16 hours allowed by law.

In *United States vs. Atchison T. & S. F. R. Co.*, 220 U. S. 37, 43-44, 55 L. Ed. 361, 363, Justice *Holmes* rendering the Opinion, the Supreme Court (affirming 177 Fed. 114) said (*Italics ours*):—

“The case is this: By sec. 2 it is made unlawful for common carriers subject to the act to permit any employee subject to the act to be *on duty* ‘for a longer period than *sixteen consecutive* hours’ or, after that period, to go on duty again until he has had at least *ten consecutive* hours *off* duty, or *eight* hours *after sixteen hours’ work in the aggregate*: Provided that no telegraph operator and the like shall be permitted to be ‘on duty for a longer period than nine hours in any twenty-four hour

period in all towers, offices, places and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime,' with immaterial exceptions. By sec. 3 there is a penalty of not exceeding \$500 for each violation of sec. 2. The defendant was subject to the act. It had a station and telegraph office, at Corwith, in the outer limits of Chicago, which was shut from 12 to 3 by day and by night, but open the rest of the time. The government contends that this was a place 'continuously operated night and day.' At this station the same telegraph operator was employed from half past 6 o'clock in the morning until 12, and again from 3 P. M. to half-past 6, or nine hours, in all, of actual work. *The government contends that when nine hours have passed from the moment of beginning work, the statute allows no more labor within twenty-four hours from the same time, even though the nine hours have not all of them been spent in work.* According to the government's argument, the operator's nine hours expired at half-past 3 in the afternoon. These questions on the construction of the statute are the only ones that we have to decide.

"We are of opinion that the government's argument can not be sustained, even if it be conceded that Corwith was a place continuously operated night and day, as there are strong reasons for admitting. The antithesis is between places continuously operated night and day and places operated only during the daytime. We think that the government is right

in saying that the proviso is meant to deal with all offices, and if so, we should go farther than otherwise we might in holding offices not operated only during the daytime as falling under the other head. A *trifling interruption* would not be considered, and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent.

“But if we concede the government’s first proposition, it is impossible to extract the requirement of fifteen hours’ continuous leisure from the words of the statute by grammatical construction alone. The proviso does not say nine ‘consecutive’ hours, as was said in the earlier part of the section, and if it had said so, or even ‘for a longer period than a period of nine consecutive hours’, still the defendant’s conduct would not have contravened the literal meaning of the words. *A man employed for six hours and then, after an interval for three, in the same twenty-four, is not employed for a longer period than nine consecutive hours. Indeed, the word ‘consecutive’ was struck out* when the bill was under discussion, on the suggestion that otherwise a man might be worked for a second nine hours after an interval of half an hour. In order to bring about the effect contended for it would have been necessary to add, as the section does add in the earlier part, a provision for the required number of consecutive hours off duty. The presence of such a provision in the one part and its absence in the other is an argument against reading it as implied.

“The government suggests that if it is not implied, a man might be set to work for two hours on and two hours off, alternately. This hardly is a practical suggestion. We see no reason to suppose that Congress meant more than it said. On the contrary, the reason for striking out the word ‘consecutive’ in the proviso given, as we have mentioned, when the bill was under discussion, and the alternative reference in sec. 2 to ‘*sixteen consecutive hours*’ and ‘*sixteen hours in the aggregate*’, show that the obvious possibility of two periods of service in the same twenty-four hours was before the mind of Congress, and that there was no oversight in the choice of words.

Judgment of Circuit Court of Appeals affirmed.”

This Case—Atchison T. & S. F. Ry. Co. vs. U. S. 177 Fed. 114, was decided by the Circuit Court of Appeals for the Seventh Circuit, Circuit Judge *Grosscup* rendering the opinion, which is *affirmed* by the *Supreme Court* in the 220 U. S. 37, quoted above; on pages 118, 119, the Opinion states:—

“The contention of the Government is, that while in neither of the cases above mentioned was the operator required or permitted to remain on duty for more than nine hours in any twenty-four in the aggregate, such service, within the contemplation of the statute either is to be divided into ‘two periods’, separated by the intermission (for which the statute makes no provision), or is to be considered as ‘one period’, including the intermission, which

would make it a period of twelve hours. But manifestly, Congress did not intend that an intermission of three hours, in the middle of the day, should be computed as a part of the employee's service; for *the statute was enacted in view of the customs of the land*, and the customs of the land do not include such intermissions as a part of the working hours of employees. The position of the Government is therefore reduced to its contention respecting the word 'period',—that 'period' is a 'term', 'a cycle', something 'continuous' between a definite beginning and a definite end—whereby, invoking the canon of strict construction in criminal statutes, the period was a period of twelve hours, notwithstanding the intermission.

"We cannot concur in this view. The statute was passed *with custom as a background*. According to custom, nine hours' work unquestionably means nine hours' *actual* employment, whether broken by an intermission for lunch or on account of some other occasion. According to custom, too, especially in railroading in the new western States, the actual service of employees is divided, necessarily divided throughout the day, to correspond with the arrival and departure of trains. Certainly Congress did not intend to override these existing customs; making it necessary either that the railroad company should not not give intermissions, or that the employee should be paid notwithstanding the intermissions; and making it necessary at many stations (presumably well known to Congress) that the railroad should either employ a dif-

ferent telegraph operator for every train that came and went (trains on western roads being often more than nine hours apart), irrespective of the fact that the actual service for each train was a very short period of time. The contention of the Government gives to this word 'period', all things considered, a highly strained meaning. Disregarding a meaning so strained, and reading the word in connection with the context, and *in the light of ordinary custom*, we are clear that the acts proven do not constitute an offense within the meaning of the law. And, if it be objected that under this construction of the law, it would be possible for the railroad company to require its operators to give their service for short period at short intervals, say every alternate hour, or any hour in every two hours and a half, thus so spreading his actual service over the twenty-four hours that no opportunity would be given for real recuperation, the answer is that no instance of such practice has been brought to our attention, and no such instance is likely, which accounts for the fact that no provision in the Act is made for such instances. When such practice actually occurs, Congress will doubtless provide a cure. A further answer is that despatchers, being 'employees', comes under the protection of the main part of the section which gives to all employees 'at least eight consecutive hours off duty' in each day, counting from some point in the next day."

In *United States vs. Chicago M. & P. S. Ry. Co.*
197 Fed. 625, 626, Judge *Rudkin* said:

"The train in question was what is commonly known as an extra or work train, operating between the stations of Easton and Keechelus, in Kittitas county. The train crew was engaged in picking up logs along the right of way, loading them onto the cars and hauling the loaded cars to Whittier station in Kittitas county, where they were taken up by one of the defendant's regular trains and transported to St. Joe, in the state of Idaho.

"The pay time of the crew commenced at 4:30 a. m., but the crew was not called until 5 a. m. The crew was allowed from 30 to 45 minutes for breakfast, and about 1 hour each for the midday and evening meals. At meal time the crew was relieved from duty and a watchman placed in charge of the train. If the time allowed for meals be deducted from the time of service, the crew was not employed for 16 consecutive hours; but, if these deductions be not made, it was admittedly employed for a longer period than allowed by law."

And again, pages 627, 628, 629, the Court said:—

"Nor should the brief periods allowed for meals be deducted from the time of service, in order to break its continuity. The statute uses the terms, 'sixteen consecutive hours,' and 'continuously on duty'; and while, literally speaking, 'consecutive' means succeeding one another in regular order, *with no interval or break*, and the word 'continuously' means substantially the same, *yet it is manifest that no such strict or literal meaning of these expressions was intended.*

"I cannot believe that by the expressions, 'sixteen consecutive hours', and 'continuously on duty', Congress intended to include only those who are employed for 16 hours, without interruption for meals or otherwise. Congress was no doubt mindful of the fact that no laboring man works for 16 consecutive hours, or is on duty continuously for that period, without food or drink, except in cases of dire necessity, and the act should not be so restricted. It may be said that trainmen are on duty and subject to call during meal hours, but this is only because such is the will of their employers. If a railroad company may relieve its employes from service during meal hours, it may also relieve them from service every time a freight train is tied up on a side track waiting for another train, and thus defeat the very object the Legislature had in view. The *brief interruptions for meals were 'trifling interruptions'*, in the language of the court in the Atchison Case, *supra*."

"If the three hours layoff is deducted from the time of service, the crew was not employed for 16 consecutive hours; but, if not so deducted, the time or service exceeded that limited by law. *If this crew had been laid off for a definite period of three hours at a terminal or other place where the crew might rest, such lay-off would no doubt break the continuity of the service.* Atchison Case, *supra*. But such was not the case here. The crew was laid off for an indefinite period, awaiting the arrival of a delayed engine. They did not know at what moment the train might move,

and had no place to go except to a bunk house, or remain in the caboose. They chose the latter course. This, in my opinion, was a trifling interruption."

Also: Judge *POPE*, in U. S. vs. Denver & R. G. R. Co. 197 Fed. 629.

In Missouri, K. & T. Ry. Co. vs. United States, 231 U. S. 112, 58 L. Ed., Justice *Holmes* again rendering the Opinion, the Supreme Court cited the decisions of Judges *Rudkin* and *Pope* with apparent approval on these points.

In United States vs. Atchison T. & S. F. Ry. Co. 212 Fed. 1000, Judge *Sawtelle* very fully discusses the meaning of "terminal" as used by railroads and intended by this Act, and on page 1007 says:—

"It does not appear that the word "terminal" has been judicially defined. According to the usage of railroad men in the United States, as shown by the evidence in this case, each train crew is assigned by the officers of the company to a definite, fixed run, beginning and ending at fixed points or places on its line of railroad; and, in my judgment, *these fixed beginning and ending points of a given run for a given crew are the "terminals" of that run within the meaning of the word "terminal" as used in the proviso in section 3 of this act.* In the usage of railroad men there are different 'runs' for different train crews, and also different runs for different employes on the same train, and the run of an engineer on a passenger train might be different from the run of a

conductor or brakeman. There may be one run for a freight crew and another run for a passenger crew, and these runs may not be, and usually are not, coterminous, and one run or several runs for freight crews may lie between the terminals of the run of a single passenger crew, and each of these runs has its own terminals. *And in applying this act to a given case, regard must be had to the line of service in which the train crew or employes in question were engaged at the time of the alleged violation of the act, and to that alone.*

"It follows that Barstow was not a terminal for train No. 18, or for said conductor or brakemen, and that the defendant did not violate said act by requiring or permitting the employes mentioned in the complaint to be or remain on duty for a longer period than 16 consecutive hours and in requiring said train crew to continue on duty to the terminal or end of that run."

SECOND:—SECTION 2 OF THIS ACT EXPRESSLY RECOGNIZES THAT THERE MAY BE BREAKS IN THE SIXTEEN CONSECUTIVE HOURS AND IN SERVICE CONTINUOUSLY FOR SIXTEEN HOURS, BY FOLLOWING UP THE USE OF THE WORDS "CONSECUTIVE" AND "CONTINUOUSLY" WITH THE WORDS "SIXTEEN HOURS IN THE AGGREGATE."

Section 2 of the Act provides for not *allowing* the crew member (a) to be or *remain* on duty for a longer period than sixteen *consecutive* hours; and (b) *relieving* him from duty after *continuously* being on duty sixteen hours and allowing 10 con-

secutive hours of rest; and (c) *permitting* him to go *again* on duty *after* having been sixteen hours *in the aggregate* on duty, without having at least *eight* consecutive hours *off* duty; etc.

Now these words: "*in the aggregate*", we insist, disclose an express recognition by Congress in this Act, that the *service on duty* may consist of several *separated* periods of time *on duty*, the *aggregate* of which must not exceed sixteen hours, without allowing *eight consecutive* hours *off* duty; and that, where the member of the train crew has served sixteen hours, without as long a period as eight *consecutive* hours *off duty* intervening, such member cannot resume duty until he has had such eight *consecutive* hours rest; but the sixteen hours on duty may be made up of several periods *on duty* and following several periods *off* duty, provided the periods off duty do not amount to what Justice Holmes styled "*trifling interruptions*" of duty, described by Judge Rudkin as similar to eating *meals*, *waiting on a sidetrack* for a train to go by, and such like *delays* the periods of which are so uncertain that the crew is really *standing by* and not released.

The *purposes* of this Hours of Service Act were *two*: 1st. For the protection of *the Public*, against the dangers possible where the train crews had been on duty too long a time without (a) any rest, and (b) without sufficient rest; and 2d. For the protection of *the train crews*, against being required to

be on duty too long, (a) for "longer period" than sixteen "*consecutive*" hours, (b) on duty for sixteen hours "*continuously*", and (c) on duty for sixteen hours "*in the aggregate*", without *sufficient* rest.

Therefore, the Act declared, in Section 2, 1st, that no member of the train crew should be required or permitted to remain on duty longer than "sixteen *consecutive*" hours; 2d, that when any such member of the crew had been on duty for sixteen hours "*continuously*" he should not be required or permitted to again go on duty *until* he has had at least *ten* consecutive hours *off* duty; and 3d, that where any such member of the crew had been on duty "*in the aggregate*" for sixteen hours in any 24 hour period, he should not be required or permitted to continue or again go on duty without having had *Eight* consecutive hours *off* duty; the 1st and 2d cases calling for *ten* hours rest in the 24 hours period wherein there was 16 hours consecutive or continuous service; and the 3d case calling for only *Eight* hours rest where the service was *not* 16 consecutive or continuous hours, but was for broken or separated periods "*in the aggregate*" amounting to 16 hours.

Thus, this Act as to periods of service and rest recognizes expressly that because of the *continuous* service for 16 hours or for 16 *consecutive* hours, there should be a *rest* of *ten* consecutive hours; and that, because there might be service *not continuous* for 16 hours but during periods of *service* broken up by periods of *rest*, that these *separated* periods

of service should *not exceed* 16 hours "*in the aggregate*", nor should he go on duty again until he had *Eight* consecutive hours *off* duty; and necessarily then, the Act recognizes that a member of the crew may be *on* duty sixteen hours "*in the aggregate*" as well as for sixteen *consecutive* hours or *continuously* for sixteen hours, by providing that the period of *rest* where the service is continuous or during consecutive hours, must be *ten* consecutive hours, and that the period of *rest* where the *service* is *not* continuous or for 16 consecutive hours, but during separated periods "*in the aggregate*" 16 hours, the period of *rest* need be *only Eight* consecutive hours.

The *Supreme Court* by Mr. Justice *Holmes*, in *U. S. vs. A. T. & S. F.* (220 U. S. 37, 43, 44, 55 L. Ed. 361, 363), said:—

"The government contends that when nine hours have passed from the moment of beginning work, the statute allows no more labor within twenty-four hours from the same time, even though the nine hours have not all of them been spent in work. According to the government's argument, the operator's nine hours expired at half-past 3 in the afternoon. These questions on the construction of the statute are the only ones that we have to decide.

"We are of opinion that the government's argument can not be sustained, even if it be conceded that Corwith was a place continuously operated night and day, as there are strong reasons for admitting. The antithesis

is between places continuously operated night and day and places operated only during the daytime. * * *

“A man employed for six hours and then, after an interval for three, in the same twenty-four, is not employed for a longer period than nine consecutive hours.”

Therefore, the *definite* periods of *rest* or *release* as they are called during *separated* periods of service are recognized by Section 2 of this Act, and are to be deducted from the period of time intervening between the member of the crew commencing on duty and his final release from duty; providing that these periods of break or rest during the service do not amount to what Justice *Holmes* styled “trifling interruptions”, and which Judge *Rudkin* described as time while eating meals, waiting on a side track for passing trains, taking water, oil and such like, as in such cases the crew are not in fact released but “standing by” ready for duty.

THIRD:—THE PERIOD OF DELAY IN THIS CASE WAS EXCUSABLE UNDER THE PROVISO CONTAINED IN SECTION 3 OF THIS ACT, AS BEING THE RESULT OF A CAUSE NOT KNOWN AND WHICH COULD NOT HAVE BEEN FORESEEN AT THE TIME THIS TRAIN LEFT ITS STARTING TERMINAL, LORDSBURG.

Section 3 of this Act specifies *four* cases in which the Act *shall not apply*: (a)—Casualty; (b)—Unavoidable accident; (c)—Act of God; and (d)—“Nor where the delay was the result of a cause not

known to the carrier or its officer in charge of such employee, at the time said employee left a terminal, and which could not have been foreseen".

Therefore, it is clear beyond dispute, that this Act expressly declares that the carrier *shall not be liable* under its provisions *for any delay*, no matter from what such delay may arise, "where the delay was *the result of a cause not known*", etc., "*at the time said employee left a terminal*".

Consequently, the carrier is *exempted* from the consequences of *any delay*, no matter from what it may arise, where *the delay* was the result of a *cause not known*, etc., even though such *cause* of delay be neither a casualty, nor an unavoidable accident, nor act of God.

This *delay*, and the *cause* thereof, which the proviso of Section 3 exempts from the provisions of the act, does not mean *only similar* causes of delay, but means *any delay* arising; and this is emphasized by the use of the word "*nor*", not "*or*", following the *three causes* already *enumerated*. The test is, was the *cause* of the delay known at the time this train left its starting terminal Lordsburg at 6 A. M. or could it have been foreseen; if the *cause* was not known and could not have been foreseen, this delay is excused; and whether it was known or could have been foreseen was a question for the jury, and the Court erred in directing a verdict for the Government and not letting the case go to the jury.

II.

THE EVIDENCE IN THIS CASE PRESENTED QUESTIONS OF MIXED LAW AND FACT SUFFICIENT TO REQUIRE THE COURT TO SUBMIT THE CASE TO THE JURY FOR THEIR VERDICT, AND IT WAS ERROR TO DIRECT A VERDICT FOR THE GOVERNMENT.

In United States vs. Northern Pacific R. Co. 213 Fed. 539, 540, 541, Judge Rudkin said:—

“Perhaps it *cannot* be said as a *matter of law* in all cases whether a *release from duty* for a *fixed period of time* will or will not be sufficient to break the continuity of the service. No doubt *in extreme cases the court may declare as a matter of law* that a given period is so short as not to break the continuity of the service, or that another period is so long as to break the continuity of the service, *but between these extremes there is a twilight zone, where the question becomes a mixed one of law and fact.*”

In Phoenix Mutual Life Insurance Company vs. Doster, 106 U. S. 30, 27 L. Ed. 65, the Supreme Court held the rule to be, that a *directed verdict* can only be granted upon the theory that upon *no legally possible view* of the evidence could a contrary verdict stand.

Texas & Pac. R. Co. vs. Cox, 145, U. S. 593,
36 L. Ed. 829;

Empire State Cattle Co. vs. Atchison T. &
A. C., 210 U. S. 1, 8, 52 L. Ed. 931, 936.

The evidence in this case was the undisputed testimony of the train crew and the dispatcher with the evidence contained in the records of the Company relating to this particular *local freight* train and its mishaps, from terminal to terminal—Lordsburg to Benson; and this evidence showed that it *became necessary*, after the train had left Lordsburg at 6 A. M. to detain it on its arrival at Bowie for not less than 2 hours and 25 minutes, to detach the Engine and send it to help another train up the hill from San Simon to Steins (Tr. p. 39, 40); and at Bowie the Conductor and trainmen were *relieved from duty* from 9:15 to 11:40 A. M., while the Engineer and Fireman were so employed with their Engine; the Engine returned to Bowie at 1:30 P. M. and the Engineer and Fireman and the Conductor and Trainmen were again *relieved from duty* for the period from 1:30 to 2:30 P. M. on account of being blocked by other intervening trains and switching operations caused by the delay at Bowie (Tr. p. 65, 66). The entire crew lived in Benson (p. 44).

Thus there was a period of 3 hours and 25 minutes during which this train crew (Conductor and Trainmen; 1 hour for the Engineer and Fireman, the Engineer and Firemen were finally relieved at Cochise) were *relieved from duty* at Bowie, because of the necessity of detaching their Engine at Bowie to help another train up a hill, this *delay* being the result of a cause not known and which could not have been foreseen at the time this train

and crew left its Lordsburg terminal, and therefore the *delay* was excused under the *proviso* in Section 3 of the Act; and this period of *delay* was also to be *deducted* from the 16 hour period, because that Crew had been *relieved from duty* during the period of the delay and *were resting*, and such relief from duty under the circumstances did break the continuity of the service within the meaning of the law.

Upon the Motion to direct a verdict, all of the evidence must be given its full weight in favor of the opposite party, in this case, in favor of the Plaintiff in Error, together with all inferences legally deducible from the evidence; and unless the Court would have been compelled to set aside a verdict in favor of the Plaintiff in Error as contrary to and not supported by the evidence, the Court should have submitted the case for their verdict to the jury.

The Government insists however, that we are not entitled to have the evidence reviewed by this Court, after the Order of the District Court directing a verdict, because the Government and the Defendant *both* moved the Court *for a directed* verdict, citing:—

Buetell vs. Magone, 157 U. S. 154, 39 L.
Ed. 654;

The Supreme Court, by Mr. Justice *White*, said, in that case:—

“The contention is advanced that as each party below requested the Court to instruct the jury to return a verdict in his favor, this was equivalent to a stipulation waiving a jury and submitting the case to decision of the court. From this premise two conclusions are deduced, first, that, there being no written stipulation, the decision below cannot be reviewed upon writ of error; second, that, even if the request in open court, made by both parties, be treated as a written stipulation, the correctness of the decision below cannot be examined, because it is in the form of a general finding on the whole case, and findings of the court upon the evidence are reviewable only when they are special.

“The request, made to the court by each party to instruct the jury to render a verdict in his favor was *not equivalent to a submission of the case to the court, without the intervention of a jury*, within the intendment of sections 649, 700, Revised Statutes. As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action, to consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof. *Lehnen v. Dickson*,

148 U. S. 71 (37: 373); Runkle v. Burnham, 153 U. S. 216 (38: 694)."

But the Defendant in this case *did not* consent or stipulate or by its motion agree, to submit the case to the Court, as the Government's motion *did*. The *record* shows as follows:—

"Thereupon, and before the Court charged the jury and before argument, plaintiff moved the Court that it direct the jury to return a verdict in its favor upon the first and second causes of action set forth in the complaint, and that the court direct the jury to return a verdict in its favor upon the third, fourth, fifth, and sixth causes of action set forth in the complaint.

"Thereupon, and before argument and before the Court charged the jury, defendant, by its counsel moved the Court to direct the jury to return a verdict in its favor upon the first, second, third, fourth, fifth and sixth causes of action as set forth in the complaint, *and that in case said motion be denied that it have leave to go to the jury.*

"Thereupon, after argument by the respective counsel in the absence of the jury the Court granted plaintiff's said motion for a directed verdict in favor of plaintiff upon the first, second, third, fourth, fifth and sixth causes of action, *and denied defendant's motion* for a directed verdict in favor of defendant on the said first, second, third, fourth, fifth and sixth causes of action *and for leave to go to the jury.*

"Defendant then and there and before the Court charged the jury duly *excepted to the*

ruling of the Court in granting plaintiff's said motion for a directed verdict in favor of plaintiff, and duly excepted to the ruling of the Court in denying defendant's said motion for a directed verdict in its favor and for leave to go to the jury in case said motion be denied." (Tr. p. 58, 59).

The Defendant, in its request, expressly moved "the Court to direct the jury to return a verdict in its favor * * * *and that in case said motion be denied that it have leave to go to the jury*" (Tr. p. 59), and expressly "*excepted to the ruling denying said Motion * * * and for leave to go to the jury in case said Motion be denied*". (Tr. p. 59).

Now, in *Empire State Cattle Co. vs. Atchison, T. & S. F.*, 210 U. S. 1, 8-9, 52 L. Ed. 931, 936-937, the same learned Justice WHITE, clearly explained his former ruling as follows:—

"If it be that the request by both parties for a peremptory instruction is to be treated as a submission of the cause to the court, despite the fact that the plaintiffs asked special instructions upon the effect of the evidence, then, as said in *Beuttell v. Magone*, 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 566, 'the facts having been thus submitted to the court, we are limited, in reviewing its action, to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof.' *If, on the other hand, it be that, although the plaintiffs had*

requested a peremptory instruction, the right to go to the jury was not waived in view of the other requested instructions, then our inquiry has a wider scope; that is, extends to determining whether the special instructions asked were rightly refused, either because of their inherent unsoundness, or because, in any event, the evidence was not such as would have justified the court in submitting the case to the jury. It was settled in *Beuttell v. Magone*, supra, that *where both parties request a peremptory instruction and do nothing more*, they thereby assume the facts to be undisputed, and, in effect, submit to the trial judge the determination of the inferences proper to be drawn from them. *But nothing in that ruling sustains the view* that a party may not request a peremptory instruction, *and yet, upon the refusal of the court to give it, insist*, by appropriate requests, *upon the submission of the case to the jury*, where the evidence is conflicting, *or the inferences to be drawn from the testimony are divergent*. To hold the contrary would unduly extend the doctrine of *Beuttell v. Magone*, by causing it to embrace a case not within the ruling in that case made. The *distinction* between a case like the one before us and that which was under consideration in *Beuttell v. Magone* has been pointed out in several recent decisions of circuit courts of appeals. It was *accurately noted* in an opinion delivered by Circuit Judge Severens, speaking for the circuit court of appeals of the sixth circuit, in *Minahan v. Grand Trunk Western R. Co.* 70 C. C. A. 463, 138 Fed. 37, 41, and

was also *lucidly stated* in the concurring opinion of Shelby, Circuit Judge, in *McCormack v. National City Bank*, 73 C. C. A. 350, 142 Fed. 132, where, referring to *Beuttell v. Magone*, he said (p. 351):

“ ‘*A party may believe that a certain fact which is proved without conflict or dispute entitles him to a verdict. But there may be evidence of other, but controverted, facts, which, if proved to the satisfaction of the jury, entitles him to a verdict, regardless of the evidence on which he relies in the first place. It cannot be that the practice would not permit him to ask for peremptory instructions, and, if the court refuses, to then ask for instructions submitting the other question to the jury. And if he has the right to do this, no request for instructions that his opponent may ask can deprive him of the right. There is nothing in Beuttell v. Magone, supra, that conflicts with this view when the announcement of the court is applied to the facts of the case as stated in the opinion.*

“ ‘In New York there are many cases showing conformity to the practice announced in *Beuttell v. Magone*, but they *clearly recognize the right* of a party who has asked for peremptory instructions *to go to the jury* on controverted questions of facts *if he asks* the court to submit such questions to the jury. *Kirtz v. Peck*, 113 N. Y. 226. 21 N. E. 130; *Sutter v. Vanderveer*, 122 N. Y. 652. 25 N. E. 907.

“ ‘The fact that each party asks for a peremptory instruction to find in his favor *does not submit* the issues of fact to the court, so

as to deprive the party of the right to ask other instructions, and to except to the refusal to give them, *nor does it deprive him of the right to have questions of fact submitted to the jury if issues are joined on which conflicting evidence has been offered.* Minahan v. Grand Trunk Western R. Co. 70 C. C. A. 463, 138 Fed. 37.'

"From this it follows that the action of the trial court in giving the peremptory instruction to return a verdict for the railway company *cannot be sustained merely* because of the request made by both parties for a peremptory instruction, in view of the special requests asked on behalf of the plaintiffs. *The correctness*, therefore, of the action of the court in giving the peremptory instruction *depends not upon the mere requests* which were made on that subject, but upon whether the state of the proof was such as to have authorized the court, in the exercise of a sound discretion, to decline to submit the cause to the jury. That is to say, the validity of the peremptory instruction must depend upon whether the evidence was so undisputed or was of such a conclusive character as would have made it the duty of the court to set aside the verdicts if the cases had been given to the jury and verdicts returned in favor of the plaintiff. McGuire v. Blount, 199 U. S. 142, 148, 50 L. ed. 125, 130, 26 Sup. Ct. Rep. 1, and cases cited; Marande v. Texas & P. R. Co. 184 U. S. 191, 46 L. ed. 495, 22 Sup. Ct. Rep. 340, and cases cited; Southern P. Co. v. Pool, 160 U. S. 440, 40 L. ed. 486, 16 Sup. Ct. Rep. 338, and cases cited.

“To dispose of this question requires us to consider somewhat in detail the origin of the controversy, the contracts of shipment from which the controversy arose, and *the proof* which is embodied in the bill of exceptions relied on *to justify the inference* of liability on the part of the railway company.”

Therefore, the Defendant did *not* request the Court to find the facts, but asked to go to the Jury if its request for a directed verdict should be denied; and the request for a directed verdict by the Defendant coupled as it was with the request to go to the jury in case such request should be denied by the Court, did not, within the fair explanation by Justice White in 210 U. S. 1, 8, 9, of his former decision in 157 U. S. 154, constitute a consent that the Court should find the facts, or prevent Defendant now having the evidence reviewed here.

Now, in this case, the Government contends that these *two releases* from duty were not releases for *definite* periods, but that the members of the crew were subject to be called to duty at any minute; the Government also claims that the period of *delay* could have been foreseen, and that there were *terminals* within this Act between Lordsburg and Benson at which this crew could and should have been relieved from duty so that their time of service would not exceed 16 hours; also, the Government questions whether *any releases for definite* periods were given this crew, and insists that such releases were mere “*trifling interruptions*” and did *not*

break the continuity of their service. These questions and all of the inferences legally deducible from the evidence were questions *for the jury* and not for the Court, and the Court erred in directing the verdict for the Government.

III.

The *entire evidence* in this case was introduced *by the Government*, and conclusively establishes that this train crew were not permitted or required to be or remain on duty exceeding *16 hours in the aggregate*, as allowed by Section 2 of this act.

It is respectfully submitted, the judgment as to these *last six* Counts in the Complaint should be reversed with directions to enter judgment for Defendant.

FRANCIS M. HARTMAN,
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Attorneys for the Plaintiff in Error.

No. 2465

United States
Circuit Court of Appeals

For the Ninth Circuit.

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian Ad Litem,

Plaintiff in Error,

vs.

THE ARIZONA COPPER COMPANY,
LIMITED, a Corporation,

Defendant in Error,

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Arizona.

Filed

SEP 22 1914

F. D. Monckton,

Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the
District of Arizona.*

In the Matter of the Petition of RICHARD
SILVAS, an Infant, for the Appointment of
a Guardian *ad Litem*.

Petition for Appointment of Guardian Ad Litem.

To the Honorable WILLIAM H. SAWTELLE,
Judge of said District Court.

Your petitioner respectfully represents:

1.

That the above-named Richard Silvas is a minor over fourteen years and under twenty-one years, and that he resides with your petitioner at Clifton, Greenlee County, State of Arizona, and that your petitioner is the father of said infant, and makes this application on his behalf, and avers that said minor has a cause of action against The Arizona Copper Company, Limited, a corporation, duly organized under the laws of Great Britain and Ireland, and is a citizen of the Kingdom of Great Britain, and that it has complied with the law pertaining to foreign corporations doing business in the State of Arizona, and that it is doing business in the county of Greenlee, State of Arizona, where it is engaged in mining, smelting and treating of ores and railroading.

2.

That on January 10th, 1911, or thereabouts, the said infant was an employee in the service of said corporation as brakeman on a slag train of said corporation at said county of Greenlee, and on said day,

owing to the unsafe condition of said cars and negligence of said corporation, said infant fell under the wheels of the cars of said slag train, and as a result thereof said infant was caused to lose a leg, and was otherwise crippled. That said infant desires to bring an action in said United States District Court for the District of Arizona, for damages, against said corporation, on the account of said injuries.

3.

That said infant is a native-born citizen of the United States, citizen of the State of Arizona, and a resident of the county of Greenlee, State of Arizona, and also your petitioner is a citizen of the State of Arizona, a resident of the town of Clifton, Greenlee County, State of Arizona. [2*]

That your petitioner has made this application at the request of said infant, and that your petitioner believes he is a proper and fit person to be appointed guardian *ad litem* of said minor in said matter.

WHEREFORE, your petitioner asks that he be appointed guardian *ad litem* of said minor, to prosecute the rights of said minor in said action.

(Signed) ROMAN SILVAS,
Petitioner on Behalf of said Minor.

State of Arizona,
County of Greenlee.

Roman Silvas, being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that said minor is over the age of fourteen years, under the age of twenty-one years; that affiant

*Page-number appearing at foot of page of original certified Record.

has heard read the foregoing petition, and knows the contents thereof, and that the allegations and statements therein contained are true of his own knowledge.

(Signed) ROMAN SILVAS.

Subscribed and sworn to before me this 29 day of September, 1913.

My commission expires Feb. 15th, 1916.

[Notarial Seal] (Signed) L. KEARNEY,
Notary Public. [3]

*In the District Court of the United States for the
District of Arizona.*

In the Matter of the Petition of RICHARD
SILVAS, an Infant, for the Appointment of
a Guardian *ad Litem*.

Order Appointing Guardian Ad Litem.

On reading and filing the annexed petition of Roman Silvas, verified the 29th day of September, 1913, for the appointment of Roman Silvas, as his guardian *ad litem*, and the consent of the said Roman Silvas, duly acknowledged, subjoined hereto, and it appearing to the Court that said Roman Silvas is a competent and responsible person, and on motion of William M. Seabury, of counsel for petitioner, it is ordered that said Roman Silvas be and he hereby is appointed guardian *ad litem* of said Richard Silvas, the infant above named, to prosecute, as such guardian for the said Richard Silvas, the action mentioned in the annexed petition.

Dated October 2, 1913.

(Signed) WILLIAM H. SAWTELLE,
Judge of said District Court.

I, the above-named Roman Silvas, hereby consent to become the guardian *ad litem* of said Richard Silvas, to bring the action referred to in the hereto annexed petition.

(Signed) ROMAN SILVAS.

State of Arizona,
County of Greenlee,—ss.

On this 29 day of September, 1913, before me personally came Roman Silvas, known to me to be the person who executed the annexed instrument, accepting said appointment of guardian *ad litem*, and acknowledged to me that he executed the same.

(Signed) ROMAN SILVAS.

Subscribed and sworn to before me this 29 day of September, 1913.

My commission expires Feb. 15th, 1916.

[Notarial Seal] (Signed) L. KEARNEY,
Notary Public. [4]

[Endorsements]: No. 107. In District Court of the United States for District of Arizona. In the Matter of the Petition of Roman Silvas for Appointment of Guardian *ad Litem* of Richard Silvas, an Infant. Petition for an Order to Appoint Guardian *ad Litem*. Written Consent of the Requested Guardian. Order Appointing Guardian. Filed October 2d, 1913. (Signed) George W. Lewis, Clerk. [5]

*In the United States Court for the District of
Arizona.*

No. 107.

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian *ad Litem*,

Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIM-
ITED, a Corporation,

Defendant.

Summons.

Action Brought in the United States District Court
for the District of Arizona.

The President of the United States of America,
Greeting: To The Arizona Copper Company,
Limited, a Corporation.

YOU ARE HEREBY SUMMONED and required
to appear in an action brought against you by the
above-named plaintiff in the United States District
Court for the District of Arizona, and answer the
complaint filed therein with the Clerk of this said
District, or in all other cases within thirty days there-
after, the times above mentioned being exclusive of
the day of service, or judgment by default may be
taken against you.

Given under my hand and seal of the United
States District Court for the District of Arizona, this
third day of October, A. D. 1913.

[Seal of Court]

(Signed) GEORGE W. LEWIS,
Clerk of the said District Court.

State of Arizona,
County of Greenlee,—ss.

I HEREBY CERTIFY that I received the annexed summons on the 6th day of October, 1913, at 10:45 A. M., and personally served the same on the 6th day of October, 1913, on The Arizona Copper Company, Limited, the corporation defendant named in said summons, by then and there delivering to and leaving with James G. Cooper, personally, at Clifton, in the County of Greenlee, State of Arizona, a copy of said summons, to which was attached a true copy of the complaint mentioned in said summons; that the said James G. Cooper [6] at the time of said service was the agent designated by said corporation on whom process issued by authority of or under the laws of the State of Arizona may be served and when so served shall be deemed, taken and held to be lawful personal service on said corporation.

Dated this 6th day of October, 1913.

C. A. OVERLOCK,
United States Marshal for the District of Arizona.

By (Signed) G. A. Franz,
Deputy United States Marshal for Dist. of Arizona.

[Endorsements]: No. 107. United States District Court, District of Arizona. Summons. Filed Oct. 10, 1913. (Signed) George W. Lewis, Clerk. [7]

[Minutes of Court—December 13, 1913.]

MINUTE ENTRY MADE DECEMBER 13, 1913.

No. 107.

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian *ad Litem*,
Plaintiff,

vs.

ARIZONA COPPER COMPANY, LIMITED, a
Corporation,
Defendant.

IT IS ORDERED that this case be set for hearing
on December 20th, 1913, on the motion heretofore
filed herein. [8]

[Minutes of Court—December 20, 1913.]

MINUTE ENTRIES APPEARING UNDER
DATE OF DECEMBER 20, 1913.

No. 107.

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian *ad Litem*,
Plaintiff,

vs.

ARIZONA COPPER COMPANY, LIMITED, a
Corporation,
Defendant.

Comes now the plaintiff by his attorney, and asks
leave of the Court to withdraw his application here-
tofore filed herein to sue *in forma pauperis*, and same
was accordingly agreed.

No. 107.

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian *ad Litem*,
Plaintiff,

vs.

ARIZONA COPPER COMPANY, LIMITED, a
Corporation,
Defendant.

Comes now the defendant, by W. C. McFarland, Esquire, its attorney, and the plaintiff, by James Westervelt, its attorney, and the demurrer interposing the statute of limitation which was filed by the defendant to the complaint of the plaintiff, is argued by counsel and submitted to the Court for its decision and judgment thereon, and the Court takes the same under advisement until a future day of this term.
[9]

[Minutes of Court—January 10, 1914.]

MINUTE ENTRY APPEARING UNDER DATE
OF JANUARY 10, 1914.

No. 107.

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian *ad Litem*,
Plaintiff,

vs.

ARIZONA COPPER COMPANY,
Defendant.

IT IS ORDERED that this case be set for trial on January 26th, 1914. [10]

[Minutes of Court—January 21, 1914.]

MINUTE ENTRY APPEARING UNDER DATE
OF JANUARY 21, 1914.

No. 107.

RICHARD SILVAS, a Minor,

Plaintiff,

vs.

ARIZONA COPPER CO.,

Defendant.

IT IS ORDERED that the order heretofore made setting the trial of this case for January 26th, 1914, be vacated, and that the case be continued until the April Term of this court at Phoenix. [11]

[Minutes of Court—March 12, 1914.]

MINUTE ENTRIES APPEARING UNDER
DATE OF MARCH 12th, 1914.

No. 107.

RICHARD SILVAS, an Infant, by ROMAN
SILVAS,

Plaintiff,

vs.

THE ARIZONA COPPER COMPANY,

Defendant.

IT IS ORDERED that the plaintiff be required to give bond for security for costs in the sum of \$250.00,

to be approved by the Clerk of this Court, within thirty days from date hereof, to which ruling and action of the Court, the plaintiff excepted.

No. 107.

RICHARD SILVAS, an Infant, by ROMAN
SILVAS,

Plaintiff,

vs.

THE ARIZONA COPPER COMPANY,

Defendant.

The motion heretofore made by the defendant to require the plaintiff to make his complaint more definite and certain having been argued and considered by the Court,

IT IS ORDERED that said motion be granted, to which ruling and action of the Court the plaintiff excepted.

No. 107.

RICHARD SILVAS, an Infant, by ROMAN
SILVAS,

Plaintiff,

vs.

THE ARIZONA COPPER COMPANY,

Defendant.

IT IS ORDERED that the motion of the defendant to dismiss this action, because of the pendency of another action of the same cause, be denied. [12]

*In the District Court of the United States for the
District of Arizona.*

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian *ad Litem*,
Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIM-
ITED, a Corporation,
Defendant.

Amended Complaint.

Plaintiff above named in this amended complaint
complains of defendant and alleges:

1.

That plaintiff is a resident of the county of Green-
lee, in the State of Arizona, and is a citizen of the
said State of Arizona.

2.

That on the 2d day of October, 1913, at Phoenix,
Arizona, on application duly made, the above-named
Roman Silvas was, by order of the Hon. William H.
Sawtelle, Judge of the District Court of the United
States for the District of Arizona, duly appointed
the guardian *ad litem* of this plaintiff, for the purpose
of this action.

3.

That defendant, The Arizona Copper Company,
Limited, is a corporation, duly incorporated under
the acts of Parliament of the United Kingdom of
Great Britain and Ireland, known as the Company's
Acts, 1862 to 1883, having its registered office at Edin-

burgh, Scotland, and is a citizen of Great Britain, and that it has filed its appointment of its statutory agent in the office of the Arizona Corporation Commission, at Phoenix, Arizona, and also filed its appointment of its statutory agent in the office of the county recorder of the County of Greenlee, State of Arizona, and that it has published its articles of incorporation, and filed the same in the office of said Arizona Corporation Commission, and that it has fully complied with all requirements of law pertaining to foreign corporations doing business in said State of Arizona, and during the times and places herein mentioned it was, has been, and yet is, such corporation, engaged in carrying on the business of mining, smelting, conducting machine-shops, [13] concentrator works, electric plant, railroading, conducting ores, and divers other business pursuits at the town of Clifton, in the county of Greenlee, State of Arizona, in its corporate name of "The Arizona Copper Company, Limited."

4.

At said town of Clifton, during the times herein mentioned, defendant has owned, conducted, and yet owns and conducts, extensive smelting and reduction works, where it manufactures about 60 tons of copper each day, and that it in such treatment melts down a large amount of rock and ore into slag, and for the purpose of disposing of said slag, it uses engines, cars and slag trains and about seven miles of railroad tracks, which connect with said smelter. The rails of the tracks so used are 36 inches apart.

That the slag train is usually designated as a part

of the Coronado railroad, but the same is owned and conducted by defendant, and the phrase, "Coronado railroad," being used to designate that business as contradistinguished from other adventures of defendant.

That defendant employs a large number of engineers, firemen, switchmen, and brakemen, whose business it is to run and operate said slag train for defendant.

That the cars used in said slag train are briefly described as follows: Being about 16 feet long, 48 inches high, the trucks rest on four wheels, two of which are at each end, and 36 inches apart, the slag pot rests on top of the trucks and is so arranged as to tip from one side to the other, to dump out the slag. The cars are all iron and will each weigh about eight tons, and the pot will hold about 5 tons of slag. That at each end of the car, at about 10 inches above the track, there is an iron platform fastened to the trucks, which platform is about 15 inches wide, 36 inches in length cross-wise of the track, and in the middle of the platform, on top of surface thereof a car coupler is bolted thereon, which takes up about one-third ($\frac{1}{3}$) of the surface of the platform, and which coupler is in a sloping shape, from one inch on the inner, to 6 inches, to outer surface of the platform, and about equi-distant from this coupler to the outer edges of the platform, on each side, iron hooks are bolted to the [14] surface thereof, which hooks turn up towards the car and take up about $\frac{1}{6}$ the surface of the platform, and that said coupler and

iron hooks take up about one-half the top surface of said platforms.

That some six or seven of said cars are coupled together and form what is known as the "slag train," which trains are moved out and back by steam locomotives, and such train sometimes going a distance of a mile from said smelter, to the point where the slag is dumped, at divers points along the line of defendant's railroads.

That there are no hand-holds, nor supports, nor anything which the brakemen or switchmen, who ride on said cars and operate said trains, can hold when said train is in motion except the outer edges of hot slag pots, which are usually hot, and that said servants in performing their said duties must stand upon said obstructed platforms, when said trains are in motion, in order to perform the work required of them by defendant in said train service.

That said platforms, on account of the manner of their construction, being small, one-half the surface thereof obstructed with said coupling devices, and some of the platforms thereof being loose, tottery and tilting, and insecurely fastened, are wabby, and there being nothing for one to hold onto except the outer edges of the slag pots, when riding on said platforms, which are insecure, unsafe and dangerous, but, nevertheless, the brakemen and switchmen must ride on said platforms in order to perform the work required of them by defendant in said train service.

That on or about January 10th, 1911, this infant plaintiff was in the service or employment of defendant, as brakeman, on said slag train on the end

thereof farthest from the locomotive, and that as such brakeman on said day, he had gone out from said smelter, with said slag train, westerly, up Chase Creek, on the line of defendant's said railroad, a distance of about $\frac{3}{4}$ of a mile from said smelter, to a point, a short distance above where the wagon road crosses said railroad, on the westerly outskirts of said town of Clifton, when hot slag was being dumped from the [15] pots of said slag train, on to damp surface, which caused much steam and smoke to arise, which obscured the vision of plaintiff, and said train being in motion, this infant plaintiff was negligently ordered by defendant to board said cars and to go with said train, and this plaintiff being then and there in the proper discharge of his duties as said brakeman, having due regard for his own personal safety, and being without fault or negligence on his part, in compliance with the said orders of defendant, attempted to get onto one of said platforms, the only place for him then and there to ride, in the discharge of his said duties, and which said platform, without notice or knowledge to plaintiff, was old, worn, bent, loose, tottery, slanting, out of shape, insecurely fastened and in bad order, so that when plaintiff stepped upon the same, the said platform tipped, tilted and turned downward and caused plaintiff to fall under the wheels of said cars, and the same ran over his feet and right leg, cutting and breaking the bones in his left foot, and breaking the bones of his right leg between the knee and ankle, so that his right leg had to be amputated just below the knee, and that he was also injured in his hips, cut,

bruised, maimed, crippled and otherwise injured, and that on account of said injuries he was confined in a hospital for three months and suffered great mental and physical pain, yet suffers, and will continue to suffer pain; that said injuries have greatly disfigured and rendered him unsightly, deformed and crippled, and is permanently disabled, and his capacity to labor or earn money is greatly impaired.

That defendant, so negligently permitted said unsafe and dangerous cars to be used as aforesaid, when the same were out of repair, unsafe and dangerous and the same were so negligently run and conducted and managed in said slag train, when in said unsafe and dangerous condition, which defective and unsafe condition caused plaintiff to fall under the wheels of said cars and sustain the aforesaid injuries.

That in addition to the negligence hereinbefore mentioned, defendant carelessly and negligently permitted said slag cars to become and remain out of repair, become unsafe, dangerous and unfit for use, and negligently permitted said cars and said platforms [16] to become loose, weakened, old and worn, insecurely fastened, and unserviceable, so that plaintiff and his coemployees could not step upon said platforms without danger of the same giving away and causing them to fall under the wheels of said cars, and that defendant negligently failed to supply said cars with hand-holds or of anything of a substantial nature to assist said employees in getting on and off said platforms with reasonable safety, yet the defendant with full knowledge of said defects, dangerous cars and unsafe platforms, before and at the time

of said injury, carelessly and negligently used and continued to use and operate said cars while the same and said platforms were so defective, dangerous and unsafe.

That before and at the time of said injury it was the duty of defendant to inspect said cars and the platforms thereof and see that the same were in a reasonably safe condition before permitting them to be used and operated; and that defendant was guilty of negligence in failing to inspect and examine said cars and the platforms thereof, before permitting the same to go out in said service in the aforesaid conditions, at the time and before plaintiff sustained his said injury; that if defendant had inspected said cars and the platforms thereof, which it was its duty to do, and which said duty it negligently failed to perform, it could and would have known of all of said defects and have avoided said injury, but, on the contrary, it negligently and carelessly permitted said cars and platforms thereof, in the defective condition aforesaid, to be operated, and used in said defective and unsafe condition from month to month to the time of said injury, without inspection or any examination thereof, and without making or attempting any needed repairs thereon, and that on account of said failure to inspect and keep said cars and platforms thereof in a reasonably safe condition the plaintiff sustained said injuries.

That the plaintiff at the time of his said injuries had just gone to work on said slag train, and had no notice or knowledge of said defects, nor notice of the said unsafe condition of said cars and platforms,

until too late to avoid said injury. [17]

That at the time of plaintiff's said injury, it was then and there, and at all times, the duty of defendant to furnish, keep, and maintain a reasonably safe, sufficient, and suitable place for plaintiff to work in, and to provide and maintain sufficient, suitable, and reasonably safe appliances with which to perform said labor, all of which defendant negligently failed to do, and that by reason of the foregoing facts the defendant did have an unsafe place and unsafe tools and dangerous appliances for the plaintiff to perform said work, which caused plaintiff's said injuries, and plaintiff's injuries were further caused by the defendant's neglect to formulate, promulgate and enforce rules and regulations for the safety of plaintiff and his coemployees, in that defendant did have an improper signal system, and had neglected to promulgate rules and regulations for the safety of the said work, and did not enforce any such rules or regulations for the safety of its employees.

That plaintiff at the time of his said injuries was but a boy of 18 years of age, was without skill, and had little or no experience in performing the character of work in which he was engaged when he sustained his said injuries, and was of immature judgment, and wanting in discretion, and from his said youth, immaturity of judgment, and want of discretion was ignorant of, and had not the capacity to understand and appreciate, the said dangers connected with said railroad work, the extent of said dangers, and the means of avoiding them.

That the work which plaintiff performed, brake-

man as aforesaid, was work which plaintiff could not perform without great danger to himself, by reason of his youth, inexperience, unskillfulness, ignorance, and incapacity, and that for the same reason the danger and its extent were not known or patent to plaintiff; and defendant, by directing the plaintiff to perform said brakeman work, exposed him to great danger and liability, that he, unless prevented by adequate instructions, warning and care, would through his youth, inexperience, unskillfulness, ignorance, and incapacity, perform the said work, and thus sustain injury.

That defendant at the time and before the date of said injuries, [18] knew and very well understood that said plaintiff was without experience as brakeman aforesaid, that he was a youth, unskilled, ignorant, and without the capacity to perform the said work, and at the date of said injury and long before that time the defendant had full knowledge of all the facts and circumstances, and it was the duty of defendant to instruct and warn the plaintiff of the said dangers and their extent, and the means of avoiding them; but, notwithstanding this knowledge on the part of defendant, its officers and agents, the defendant carelessly and negligently failed to instruct or inform the plaintiff as to said dangers and of the hazard of the employment as brakeman aforesaid; that defendant negligently failed to warn plaintiff of said dangers, the means of avoiding the same, and of the extent of said dangers, and that defendant breached its said duty in failing to warn and instruct the plaintiff as to said dangers and of the

means and methods to avoid the same, and in consequence of the said several acts of negligence, and omissions of duty, on the part of defendant, hereinbefore and hereinafter alleged, the plaintiff sustained his said injuries.

Plaintiff further says that each of the aforesaid negligent and careless acts and omissions on the part of the defendant, operating together, was the direct and proximate cause of said accident, and plaintiff's consequent injuries, and for which defendant is liable.

That plaintiff at time of happening of said accident, January 10th, 1911, was of the age of 18 years, in robust health, had always been well, and was of good constitution, then capable of earning \$2.50 per day, or \$90.00 per month, or \$1,080.00 per year. That his expectation of life at time of said injury was 43.53 years.

Plaintiff further says that defendant through its negligence and carelessness has wrongfully deprived plaintiff of his means of procuring a living, and caused plaintiff much mental and physical pain, loss of leg, crippled left foot, impaired use of limbs and body, bodily disfigurement, nervous and spinal affections, which [19] are permanent, and that he has on account of said injuries suffered damages in the sum of forty-three thousand dollars, no part of which has ever been paid plaintiff.

WHEREFORE, by reason of said premises, the plaintiff demands judgment against said defendant for the sum of forty-three thousand (\$43,000.00)

dollars; together with the costs and disbursements of this action.

L. KEARNEY,
W. M. SEABURY,
E. E. WALL,
Attorneys for Plaintiff.

[Endorsements]: No. 107. In the District Court of the United States for the District of Arizona. Richard Silvas, an infant, by Roman Silvas, his Guardian *ad Litem*, Plaintiff, vs. The Arizona Copper Company, Limited, a Corporation, Defendant. Amended Complaint. Filed April 2, 1914. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy Clerk.

Service by copy admitted this 31 day of March, 1914, Clifton, Ariz.

McFARLAND & ELLIOTT,
Attorneys for Defendant. [20]

[Minutes of Court—April 6, 1914.]

MINUTE ENTRY APPEARING UNDER DATE
OF APRIL 6, 1914.

No. 107.

RICHARD SILVAS, an Infant,
Plaintiff,

vs.

ARIZONA COPPER MINING CO., LIMITED,
Defendant.

IT IS ORDERED that this case be set for trial on
April 23, 1914. [21]

[Opinion.]

*In the District Court of the United States for the
District of Arizona.*

AT LAW.

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, his Guardian *ad Litem*,
Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED,
a Corporation,
Defendant.

L. KEARNEY, Esquire, Clifton, Arizona, and
WM. M. SEABURY, Esquire, Phoenix,
Arizona, for Plaintiff.

W. C. McFARLAND, Esquire, Clifton, Arizona,
for Defendant.

The defendant in this cause has made and filed its motion that plaintiff be required to give security for costs before proceeding further with the trial, and in support of said motion filed an affidavit of its cashier, alleging that neither the said Richard Silvas nor the said Roman Silvas, guardian *ad litem* of plaintiff, has property out of which the costs of this action could be made by execution. Thereupon the affidavits of plaintiff and his guardian *ad litem* were filed. These affidavits show the poverty of these parties, but do not contain an averment that no person interested in the cause was able to secure the costs.

It was stated in open court by counsel for defendant, and not denied by plaintiff or his counsel, that a notice had been served on defendant that counsel for plaintiff had a contract [22] with him, by the terms of which they were to be paid a sum equal to fifty per cent of the recovery as a fee for their services.

There was filed by plaintiff an objection to the motion to require security, in which it is contended that plaintiff "ought not by right to be required to give security for costs, because under the provisions of a statute of Arizona, entitled an "Act to prescribe the procedure in civil actions," approved April 1, 1913, being Senate Bill No. 90, and by section 257 of said statute, it is provided that "no guardian shall be required in any case to give security for costs, and there is no statute of Congress on the subject." That statute is as follows:

"Sec. 257. Neither the state, nor any county thereof, nor any state board or commission or state officer in his official capacity nor any executor, administrator or guardian, appointed under the laws of this state, nor any trustee in bankruptcy, shall be required in any case to give security for costs."

The defendant contends that such statute has no binding force on this Court, for the reason that Congress has legislated on the subject and this Court must look to the Act of Congress and disregard the Act of the State Legislature.

By Act of Congress of July 20, 1892 (27 Statutes

at Large, 252, Fed. Stat. Anno., Vol. 2, p. 294), it is provided:

(Sec. 1.) That any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the [23] redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

Sec. 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and wilful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury as in other cases.

Sec. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

Sec. 4. That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under

this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

Sec. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases: *Provided*, That the United States shall not be liable for any of the costs thus incurred.

The question here presented is, under which of these statutes must the Court proceed.

It is insisted by the plaintiff that section 914, Revised Statutes of the United States, commonly called the Conformity Statute, which provides that "The Circuit and District Courts of the United States in matters of practice, pleading and forms and modes of proceeding in actions at law shall conform as near as may be to the state practice," makes the State statute obligatory on this court, and the contention of the defendant is that the Act of Congress of July 20, 1892, alone can be followed.

We think the latter contention must prevail. The [24] Congressional Act referred to is in general and broad terms, and covers the whole subject.

In *Lange vs. Union Pacific R. R. Co.*, 126 Fed. 338, the Circuit Court of Appeals of the Eighth Circuit in discussing this question used this language:

"Moreover, where Congress has legislated generally upon any such subject the rules of the state practice in respect thereof are superseded, and the extent and limitations of the power of the courts of the United States are to be found in

the Congressional enactment and are not in the laws of the states.”

The conformity statute has received repeated construction by the Supreme Court of the United States.

In *Railroad Company vs. Hirsch*, 93 U. S. 291, the Court says, in speaking of the effect of that statute,

“But it does not require those courts (United States Courts) to follow the State practice in all its subordinate requirements or unimportant details. Those provisions may be rejected which in the judgment of the courts would unwisely encumber the administration of the law or tend to defeat the ends of justice.”

In *Shepard vs. Adams*, 168 U. S. 618, the Court said that uniformity of practice was left by the Act of Congress (sec. 914, Revised Statutes) to be attained largely through the discretion of the National Courts. [25]

It being thus evident that the law of Congress must furnish the standard by which this motion must be weighed, it becomes material to decide which is required by that Act.

There is now on file in this case no affidavit from the plaintiff such as is required by the statute, and as the record now stands, the order requiring security must be granted; but, as the plaintiff may again make application, we will consider what is required under this statute to authorize the Court to excuse him from giving security.

The requisites of the affidavit under this Act were considered in the case of *Boyle vs. Great Northern Ry. Co.*, 63 Federal, 539. In that case and in the

case at bar the motion and proof disclose that the plaintiff's counsel had undertaken to conduct the case on a contingent fee. The Court says:

“There is no question but what a poor person can prosecute his cause and obtain a full hearing, but at the same time litigation is not to be fostered and encouraged by allowing the plaintiff to evade any expense which he makes. That is a duty of any party having sufficient means, and is not to be evaded. If he is not able to pay costs or give security for them, he can have justice without it. But a person who acquires by contract an interest in any litigation, and a right to share in the fruits of a recovery, and who is not entitled to sue *in forma pauperis*, cannot be permitted, under cover of the name of a party who is a poor person, to use judicial process and litigate at the expense of other people. I think it does make a difference whether the plaintiff has made a contract with his counsel for their compensation. It makes this difference: that, after a contract has been made with counsel for a pecuniary interest in a lawsuit, the case is carried on partially for their benefit; and, if they are able to pay the expenses of the litigation, it is unjust for the Court to allow the litigation to go on for their benefit, without expense, on the pretense that the plaintiff is unable to pay. I shall require a showing that the plaintiff is unable to pay or secure the costs, and that there is no person interested, by contract or otherwise, in the cause of action, or entitled to share in the

recovery, who is able to pay or secure the costs. I think that such a rule is in keeping with the meaning and spirit of this law, and it is founded in reason.” [26]

In *Feil vs. Wabash R. Co.*, 119 Federal, 490, it was disclosed that the case was being prosecuted by the plaintiff's attorney on contingent fee. Speaking of the effect of such contract or contingent fees on the right of the plaintiff to be relieved of costs under the Act of July 20, 1892, the Court held that in such cases the plaintiff represents not only her own interest but also that of the attorneys in the case, and she sues for herself and as trustee for others, and standing in this position, she could not be held to be poor within the meaning of the law, unless the beneficiaries are poor also. The Court concludes: “No petition to sue as a poor person can avail, unless it discloses that all the beneficiaries, as well as the nominal plaintiff, come within the purview of the Act.”

In *Reed vs. Pennsylvania Co.*, 111 Federal, 714, the Circuit Court of Appeals, speaking through Justice Lurton, now of the Supreme Court, uses this language as to what an affidavit under this law must disclose:

“The affidavit in this case is defective in this: The suit is that of the widow and administratrix of Frank Reed, who sues for damages subsequent upon the tortious killing of her intestate and husband. Under the Ohio statute authorizing such an action, the damages recoverable are for the benefit of the widow of the deceased, and they are the real parties in interest. Bates' Abb.

St. Ohio, #6135. The beneficiaries and real parties in interest, are therefore the widow and the children of the deceased. The affidavit shows sufficiently the poverty of the widow, but is defective in not making a like showing in behalf of the children of the deceased. *Boyle vs. Railroad Co. (C. C.), 63 Fed. 539.*”

“It may be that the estate of the deceased is able to prepay the costs of the writ of error, or secure the same. If so, the act would have no application. The affidavit makes no showing as to the value of the estate of which the plaintiff is administratrix. The application is for these reasons denied, but without prejudice to its renewal upon an affidavit showing that the estate of the deceased, as well as the beneficiaries, is unable to pay the costs or give security.” [27]

In the case of *Phillips vs. Louisville & N. R. Co.*, 153 Federal, 795, is a full and able discussion of the objects to be attained by this statute; the following extracts from which will be of interest as a clear statement of the law:

“This statute is of a charitable and beneficent nature. Its sole purpose is to enable persons, who, in good faith, are unable, on account of poverty, to prosecute any suit or action in the courts of the United States, to obtain a fair chance to have their rights adjudicated. It is not intended that the statute should be used directly or indirectly to benefit those who are able to prosecute their suits. The citizen seeking the benefit of the statute, and making the affidavit

of poverty required thereby, must of necessity be the only person benefited by his cause of action. It surely was never intended by the statute that two or more persons should be interested financially in the result of a suit or action brought, and that, if one of them happens to be without means, this one can be permitted to make an affidavit of poverty and secure the benefits of the statute for the other parties to the suit who are able to prosecute same, even though they may not appear by name as parties. The admission by the attorneys for the plaintiff that they were interested to the extent of one-third of any amount that might be recovered made them financially interested in the result of the lawsuit, and, unless they too could make and file an affidavit as to their poverty, the plaintiff in this cause could not obtain the benefit of the statute."

The showing here made not being sufficient to authorize the Court to relieve the plaintiff from securing the costs, it is ordered that the plaintiff give security for costs in the sum of Two Hundred Dollars, to be approved by the clerk of the court, within thirty days from this date.

[Endorsements]: Filed Apr. 10, 1914, at — M. Geo. W. Lewis, Clerk. By (Signed) R. E. L. Webb, Deputy. [28]

*In the District Court of the United States for the
District of Arizona.*

RICHARD SILVAS, an Infant, by ROMAN SIL-
VAS, His Guardian *ad Litem*,
Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIM-
ITED, a Corporation,
Defendant.

Answer to Amended Complaint.

Without waiving any motions to strike filed in this court, but especially reserving the right to press the same before this court, comes now The Arizona Copper Company, Limited, a corporation, the defendant above named by its attorneys, with this its answer to plaintiff's amended complaint on file herein and demurs thereto, and for ground of demurrer alleges and shows the Court:

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

WHEREFORE, defendant prays judgment as to the sufficiency of said complaint.

W. C. McFARLAND,
H. A. ELLIOTT,
Attorneys for Defendant.

Without waiving the foregoing demurrer, defendant further answers plaintiff's amended complaint and by way of separate answer and defense thereto, alleges and shows the Court:

1. That defendant was not guilty of any negli-

gence, carelessness or improper conduct towards plaintiff, as in said [29] amended complaint alleged or in any other way or manner, or at all, but that the injury or injuries received by said plaintiff, if any there were, which is not admitted, but is specially denied, were received wholly and entirely because of plaintiff's own unlawful, wrongful and negligent conduct, at the time and place of his alleged injury or injuries, in this, to wit:

That at the time and place of plaintiff's alleged injury or injuries, this plaintiff without due or any regard for his own safety, not then and there being an employee of this defendant either as in plaintiff's amended complaint alleged, or otherwise, and without permission, license or acquiescence of this defendant, but against its express prohibition, warning and advice, and not in the discharge of any duty arising out of, or imposed upon plaintiff in the course or scope of any employment by or with this defendant, or any relation, connection or affiliation of any kind, character or degree whatsoever therewith, and as a trespasser, wholly without any right or permission, acquiescence or license of this defendant to be, or to go in and upon the premises, cars, train of cars or other appliances of this defendant as in plaintiff's amended complaint described, or otherwise, but then and there at such place, at such time, against the express prohibition, warning and advice of this defendant, as aforesaid, did wilfully and knowingly and unlawfully, go upon, trespass and take a position upon a car, or train of cars, belonging to this defendant, as in said amended complaint described; it

then and there being well known to this plaintiff that he was at such place, at such time, unlawfully, wrongfully and without permission, authority, or license, of this defendant, and that such place and position were dangerous to life and to limb, he not being at such place at such time by defendant's consent, invitation or inducement, or by or through any act, order, or thing done, or omitted to [30] be done by defendant, its authorized officers, servants, employees or other agents, or otherwise, and that plaintiff received his said injury or injuries, as in said amended complaint described, or otherwise, if at all, wholly by reason of his said act, or failure to act, as aforesaid, and not by reason of any negligence, want of care, fault or default of this defendant, or that of any other person or persons, imputable to this defendant.

2. That defendant was not guilty of any negligence, carelessness or improper conduct towards plaintiff, as in said amended complaint alleged, or in any other way or manner, or at all, but that the injury or injuries received by said plaintiff, if any there were, which is not admitted but specially denied, were received wholly and entirely because of plaintiff's want of proper care and caution, and due or any regard for himself in looking out for his personal safety, and by reason of his own negligence and carelessness.

3. That if at the time and place mentioned in plaintiff's amended complaint, plaintiff received his injury or injuries while in the employ of this defendant, which is not admitted, but is specially denied

as in said amended complaint alleged, while attempting to board a train of cars belonging to this defendant, plaintiff so received his said injury or injuries wholly by reason of his own negligence and want of care at such time and place, and not by any negligence or default or want of care on the part of this defendant, and that if this plaintiff was in the employ of this defendant, at such time and place, and if any negligence, want of care, fault or default, other than that of this plaintiff as aforesaid, caused or contributed to cause said injury or injuries, it was the negligence, want of care, fault or default of a fellow-servant or fellow-servants of this plaintiff, then and there in the employment of this defendant. [31]

4. That if said plaintiff was in the employ of this defendant at the time and place of his injury or injuries as in said amended complaint described, which is not admitted, but is specially denied, defendant alleges that said injury or injuries, either as in said amended complaint alleged or otherwise, if any there were, were occasioned wholly by, and resulted from the usual and ordinary risks of the employment in which plaintiff was engaged, which said employment is denied as aforesaid at the time and place of his alleged injury or injuries, which said risks of employment, if any employment there were, were wholly assumed by plaintiff by entering upon and continuing in said employment. That said risks were fully known to and appreciated by plaintiff in entering upon and continuing in said employment, if any employment there were, which is denied as aforesaid, or by the exercise of reasonable diligence

on the part of this plaintiff should have been fully known to and appreciated by him, and that said alleged injury or injuries did not in any respect, or at all, result from, or were in any degree occasioned by any neglect or default on the part of this defendant, either as alleged in said amended complaint or otherwise, and that if plaintiff's injury or injuries as in said amended complaint described, or otherwise, if any there were, were caused or contributed to by any defect or defects in defendant's appliances, tools, machinery or cars, as in said amended complaint described, or otherwise, this plaintiff wholly assumed the risks of such employment, arising because of such defect or defects, by entering upon and continuing in his said employment, if any employment there were, which is denied, the said defect or defects at the time and place of said injury or injuries being then and there open and obvious and known to, and fully appreciated by plaintiff, or which could have been known to, or fully appreciated by plaintiff by the exercise of [32] reasonable diligence on his part.

WHEREFORE, having answered, defendant prays that plaintiff take nothing by his said cause of action, and that defendant be hence dismissed with its costs and disbursements herein expended, and what other and further relief the Court may adjudge meet and proper in the premises.

W. C. McFARLAND,

H. A. ELLIOTT,

Attorneys for Defendant.

Further answering plaintiff's amended complaint,

herein, defendant denies generally and specifically, each and every, all and singular, the allegations in said complaint contained, not herein expressly admitted or qualified.

WHEREFORE, having fully answered, defendant prays that plaintiff take nothing by his said cause of action, and that defendant be hence dismissed with its costs and what other and further relief the Court may adjudge meet and proper.

W. C. McFARLAND,

H. A. ELLIOTT,

Attorneys for Defendant. [33]

[Endorsements]: In the District Court of the United States for the District of Arizona. Richard Silvas, an Infant, by Ramon Silvas, His Guardian, *ad Litem*, Plaintiff, vs. The Arizona Copper Company, Limited, a Corporation, Defendant. Answer to Amended Complaint. Filed this 18th day of April, 1914. George W. Lewis, Clerk.

Received copy of the within Answer to Amended Complaint this 16 day of April, 1914.

(Signed) E. E. WALL,

Attorney for Plaintiff.

(Signed) L. KEMEY.

W. C. McFARLAND,

H. A. ELLIOTT,

Attorneys for Defendant. [34]

[**Minutes of Court—April 21, 1914.**]

MINUTE ENTRY APPEARING UNDER DATE
OF APRIL 21, 1914.

No. 107.

RICHARD SILVAS, an Infant,
Plaintiff,
vs.
ARIZONA COPPER MINING CO., LIMITED,
Defendant.

An order having been made by this Court on March 12, 1914, requiring the plaintiff herein to give bond in the sum of \$250.00 as security for costs herein, within thirty days from that date, and the plaintiff having failed to execute such cost bond within the said thirty days, by virtue of section — of the Code of Arizona, this case now stands dismissed and the Clerk of this Court is hereby ordered to note the dismissal of this action upon the record. [35]

[**Bill of Exceptions.**]


*In the District Court of the United States for the
District of Arizona, Sitting at Phoenix, in the
State of Arizona.*

AT LAW—No. 107.

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian *ad Litem*,
Plaintiff,
vs.
THE ARIZONA COPPER COMPANY, LIM-
ITED, a Corporation,
Defendant.

Be it remembered that after issue was joined in this cause the following proceedings were had, the Hon. William H. Sawtelle presiding, both parties appearing by counsel.

I.

On the 25th day of October, 1913, the defendant  under the provisions of a statute of the State of Arizona entitled "An act to prescribe the procedure in civil actions" approved April 1, 1913, being Senate Bill No. 90, Section 254, moved for an order requiring plaintiff, Richard Silvas and Roman Silvas, his guardian *ad litem* duly appointed by this Court as such on October 2, 1913, to give security for costs in the above-entitled cause on the ground that Richard Silvas and Roman Silvas, his guardian *ad litem*, nor either of them, are owners of property out of which costs could be made by execution sale. A copy of said motion and the affidavit upon which it was made is hereto attached as exhibit "A."

On the 30th day of October, 1913, the plaintiff filed with the clerk of this court the affidavits of Richard Silvas, the plaintiff herein, and Roman Silvas, his guardian *ad litem*, which set forth that said plaintiff and his guardian *ad litem* were [36] unable to pay the costs or any part thereof, or to give security for costs on account of the poverty of each of them, and prayed that said plaintiff and his guardian *ad litem* be permitted to prosecute this action without giving security for costs to defendant or securing costs at all. A copy of the said affidavit of Richard Silvas, the plaintiff herein, is attached hereto as exhibit "B." A copy of said affidavit of Roman

Silvas is attached hereto as exhibit "C."

On the 20th day of December 1913, the plaintiff and his guardian *ad litem* appeared by his counsel before this Court and asked leave of the Court to withdraw their application theretofore filed in this cause to sue *in forma pauperis*. Thereupon the Court granted said motion and plaintiff and his said guardian *ad litem* withdrew their said application and the affidavits by which it was made, of which exhibits "B" and "C" are copies.

Thereafter and on the same day, to wit, December 20, 1913, the plaintiff and his guardian *ad litem* made written objection to said motion of the defendant herein for an order requiring plaintiff to give security for costs on the ground that plaintiff is an infant appearing in this action by his guardian *ad litem*, and that under the provisions of section 257 of a statute of the State of Arizona entitled "An act to prescribe the procedure in civil actions approved April 1st, 1913, being Senate Bill No. 90, being par. 646, Civil Code 1913, it is provided that no guardian shall be required in any case to give security for costs and that there is no statute of Congress on the subject. A copy of said written objection is annexed hereto as exhibit "D." The defendant thereupon filed its answer thereto which is attached hereto marked exhibit "F."

On January 21, 1914, a hearing was had by the parties hereto upon said motion, and the Court, after hearing counsel on both sides, reserved decision on said motion.

Thereafter on the 12th day of March, 1914, the

Court decided that section 257 of said statute of the State of Arizona did not apply to the said proceedings and that said proceedings [37] were governed by the act of Congress of July 20, 1892 (27 Statutes at Large, 252 Fed. Stat. Anno. Vol. 2, p. 294). Thereupon, on the said 12th day of March, 1914, the Court ordered that the plaintiff be required to give bond for the security of costs in the sum of Two Hundred and Fifty (\$250.00) Dollars to be approved by the clerk of the court within thirty (30) days from date of said order and the plaintiff excepted to this ruling and order of the Court, which exception was allowed.

II.

The plaintiff having failed to execute the cost bond required by said order of March 12, 1914, within thirty (30) days, the Court on the 21st day of April, 1914, on written motion of defendant, dismissed this action and ordered the clerk of this court to enter the dismissal upon the record. It is admitted in open court that a written contract of employment existed June 13th, 1913, and now exists between plaintiff and his guardian *ad litem* and his attorneys, L. Kearney and E. E. Wall, copy of which is hereto annexed marked exhibit "E," and made a part hereof.

The foregoing is allowed and approved as the bill of exceptions in the above-entitled cause this 24th day of June, 1914.

WM. H. SAWTELLE,
Judge. [38]

*In the District Court of the United States for the
District of Arizona.*

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian *ad Litem*,
Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIM-
ITED, a Corporation,
Defendant.

**Exhibit "A" [Motion for Order Requiring Plaintiff
to Give Security for Costs].**

Comes now the defendant, The Arizona Copper Company, Limited, by its attorneys, W. C. McFarland and H. A. Elliott and shows to the Court:

That plaintiff, Richard Silvas and Roman Silvas, his guardian *ad litem*, nor either of them, are the owners of property out of which costs could be made by execution sale, wherefore defendant moves the Court for an order requiring plaintiff to give security for costs in the above-entitled cause.

W. C. McFARLAND,
H. A. ELLIOTT,
Attorneys for Defendant. [39]

*In the District Court of the United States for the
District of Arizona.*

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian *ad Litem*,
Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIM-
ITED, a Corporation,
Defendant.

**Exhibit "A"—Affidavit [of J. G. Cooper in Support
of Motion for Order Requiring Plaintiff to Give
Security for Costs].**

State of Arizona,
County of Greenlee,—ss.

J. G. Cooper, being by me first duly sworn, deposes and says: That he is the cashier of The Arizona Copper Company, Limited, defendant above named, that he has authority to make this affidavit for and in behalf of said defendant company, and that he is advised and believes, and upon such information and belief, states the fact to be, that neither Richard Silvas, the plaintiff above named, nor Roman Silvas, guardian *ad litem* of said plaintiff, has property out of which, the costs of this action could be made by execution sale.

J. G. COOPER,

Subscribed and sworn to before me this 22d day of
October, A. D. 1913.

[Notarial Seal] THOMAS B. INGLES,
Notary Public in and for the County of Greenlee,
State of Arizona.

My commission expires February 23d, 1916. [40]

*In the District Court of the United States for the
District of Arizona.*

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian *ad Litem*,
Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIM-
ITED, a Corporation,
Defendant.

**Exhibit "B" [Affidavit of Richard Silvas Re
Inability to Secure Costs].**

State of Arizona,
County of Greenlee,—ss.

Richard Silvas, being first duly sworn, says: That he is the above-named infant, plaintiff in this action, that he is a citizen of the United States and of the State of Arizona; that he does not know of any one who would go surety on any cost bond for him in this action, and that he is unable to secure cost in this action, and that on account of his poverty he is unable to give security for costs herein, and for the same reason he is unable to pay the costs or any part thereof in this action.

WHEREFORE, affiant asks that he be permitted to prosecute this action without giving security for cost to defendant, or securing cost at all.

RICHARD SILVAS.

Subscribed and sworn to before me this 28th day of October, 1913.

[Seal]

L. KEARNEY,
Notary Public. [41]

*In the District Court of the United States for the
District of Arizona.*

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian *ad Litem*,
Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIM-
ITED, a Corporation,
Defendant.

**Exhibit "C" [Affidavit of Roman Silvas Re
Inability to Secure Costs].**

State of Arizona,
County of Greenlee,—ss.

Roman Silvas, being first duly sworn, deposes and says: That he is above-named guardian *ad litem* for Richard Silvas, said infant; that affiant is a citizen of the United States and of the State of Arizona; that affiant is a *bona fide* resident of the County of Greenlee, State of Arizona, and that he is a married man and has a family depending upon him for support; that he is not the owner of any property in his own name or right, except that he has a half interest in a small lot, at Clifton, in said Greenlee County, which will not exceed in value the sum of One Hundred and Fifty (\$150) Dollars; that he does not know of any one who would go surety on any bond for him

in this action, and that on account of his poverty he is unable to give security for costs herein, and for the same reason he is unable to pay the costs herein or any part thereof.

WHEREFORE, affiant prays that he be permitted to prosecute this action as guardian *ad litem* of said Richard [42] Silvas without giving security for costs herein.

ROMAN SILVAS.

Subscribed and sworn to before me this 28th day of October, 1913.

L. KEARNEY,
Notary Public.

My commission expires February 15, 1916. [43]

*In the District Court of the United States for the
District of Arizona.*

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian *ad Litem*,
Plaintiff,

VS.

THE ARIZONA COPPER COMPANY, LIM-
ITED, a Corporation,
Defendant.

**Exhibit "D"—Objection to Motion Requiring
Plaintiff to Give Security for Costs.**

Comes now the plaintiff above named opposing the motion of the defendant herein for an order requiring plaintiff to give security for costs, and shows to this Court that he ought not by right to be required to give security for costs herein because under the

provisions of a statute of the State of Arizona, entitled an "Act to prescribe the procedure in Civil Actions," etc., approved April 1, 1913, being Senate Bill #90, and by Section 257 of said Statute it is provided that no guardian shall be required in any case to give security for costs; and there is no statute of Congress on the subject.

L. KEARNEY,

W. M. SEABURY,

Attorneys for the Plaintiff. [44]

COPY.

*In the Superior Court of the County of Greenlee,
State of Arizona.*

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian *ad Litem*,
Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIM-
ITED, a Corporation,
Defendant.

**Exhibit "E" [Contract—June 13, 1913—Richard
Silvas, etc., and E. E. Wall et al.].**

This agreement made and entered into by and between the said Richard Silvas, an infant, by Roman Silvas, his guardian *ad litem*, the parties of the first part, and E. E. Wall and L. Kearney, the parties of the second part; all of Clifton, Arizona.

WITNESSETH, that the said Richard Silvas has a cause of action against the Arizona Copper Company, Limited, a corporation, organized under the laws of Great Britain and Ireland, and which cor-

poration has complied with all the requirements of law pertaining to foreign corporations doing business in the State of Arizona, and during the time herein mentioned, it was, and yet is, such corporation, lawfully doing business at the county of Greenlee, Territory (now State) of Arizona, as a mining and smelting corporation, and engaged in other business pursuits, at said County of Greenlee.

That on or about January 10th, 1911, the said Richard Silvas was an employee for hire in the service of said corporation, at Clifton, Arizona, as brakeman, on a smelter slag train, and on said day, because of the negligence of said corporation and its servants, while said infant was in the proper discharge of his duties as such employee, in the said service of said corporation, he was thrown under the wheels of the said slag train and suffered an injury which resulted in his having a leg amputated, and was otherwise maimed and crippled; that on account of said injuries the parties of the first part desire to bring an action against the said corporation for damages, in said court, or such other court as parties of the second part may designate.

Now, therefore, for the purposes of bringing such action, and the prosecution of the same, against said corporation, the parties of the first part have hired, employed *and by these servants have employed* and retained the parties of the second part as their attorneys for such purpose, to prosecute said action in whatsoever court they may desire, until final termination thereof, and hereby giving and granting unto the parties of the second part full power and

authority, to compromise, settle or dispose of said action, or said claim for damages, upon such terms and conditions as may be deemed for the best advantage of the said Richard Silvas; that parties of the second part shall have and receive, for their said services, as compensation, one-half of any and all sums of money recovered in any such action, suit or proceeding, or upon any compromise or settlement of said claim or demand, said attorneys shall receive one-half of the sum paid on such compromise or settlement, whether such settlement or compromise be made by such attorneys or by or through others.

That parties of the first part desire to secure and protect the parties of the second part, and secure to them, the fee herein agreed to be made, and for the purpose of securing such attorney fee, does by these presents assign such claim and demand for damage, and the said cause of action against said corporation, to the said parties of the second part, as security for the said fee agreed to be paid, but this assignment is only intended as a security, and is to be void and of no effect, should the said attorney fee be paid to parties of the second part, or the same received by them, otherwise, such assignment, as such security, to remain in full force and effect.

That the parties of the second part in view of the compensation agreed to be paid them as aforesaid, and the securing the same by the lien, and security, aforesaid, agree to render said services, in any and all courts in which said action may be brought or instituted, and continue to render such services, for the consideration aforesaid until termination of such

action and proceeding.

IN WITNESS WHEREOF, said parties on this 13th day of June, 1913, agree to the same, and subscribe our names hereto.

RICHARD SILVAS.

ROMAN SILVAS.

L. KEARNEY.

E. E. WALL. [45]

*In the District Court of the United States for the
District of Arizona.*

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian *ad Litem*,
Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIM-
ITED, a Corporation,
Defendant.

**Exhibit "F"—Answer of Defendant to Affidavit to
Sue in Forma Pauperis.**

Comes now the defendant, The Arizona Copper Company, Limited, by W. C. McFarland and H. A. Elliott, its attorneys, and for answer to plaintiff's affidavit for order to prosecute this action *in forma pauperis*.

Objects to the affidavit of plaintiffs for an order to permit them to prosecute this action without giving security for costs and prepaying fees and costs on the following grounds, to wit:

1. Because it does not appear from the affidavit filed that the said Richard Silvas is a citizen of the United States or of the State of Arizona.

2. Because it does not appear from the affidavit filed by the plaintiffs in this cause that no other person or persons having interest in the result of the suit is unable to give security for costs.

3. Defendant represents and shows to the Court that on or about the third day of October, 1913, the plaintiffs, [46] Richard Silvas, and his guardian *ad litem*, Roman Silvas, entered into one certain written agreement with L. Kearney and E. E. Wall, their attorneys, wherein and whereby the said plaintiff and his guardian *ad litem*, contracted and agreed with the said L. Kearney and E. E. Wall, that for and in consideration of the services of the said L. Kearney and E. E. Wall, as their attorneys in the commencement and prosecution of this action, they, the said plaintiff and his guardian *ad litem*, to pay L. Kearney and E. E. Wall for their services as their attorneys, "a sum equal to fifty per centum of the amount received, either by suit or compromise," and by the terms of said written contract, the said L. Kearney and E. E. Wall, as their attorneys, agreed to accept said sum in full payment for their services in the prosecution of this action.

That by the terms of said written contract it was further agreed by and between plaintiff, his guardian *ad litem* and their said attorneys, L. Kearney and E. E. Wall, that plaintiff and his guardian *ad litem* would not compromise this cause without the written consent of their said attorneys.

That by the terms of said written contract it was further agreed by and between plaintiff and his said guardian *ad litem*, and the said L. Kearney and E.

E. Wall, their attorneys that said attorneys would not compromise or settle this cause without the written consent of the plaintiff and his said guardian *ad litem*.

Defendant is advised and believes, and on such advice and belief alleges, that the written contract by and between plaintiffs and their attorneys, L. Kearney and E. E. Wall, is on file in the United States District Court for the District [47] of Arizona, and is attached to the original complaint in this cause, a copy of which was served upon the defendant at the time of the service of Summons and copy of complaint; a copy of said contract and agreement hereto attached and marked exhibit "A."

Defendant further objects to said affidavit and order because it nowhere appears therein, that plaintiff and his said guardian *ad litem* believes that he, the plaintiff, is entitled to redress he seeks in this action. Because no facts are alleged in said affidavit setting forth briefly, or otherwise, the nature of the alleged cause of action.

It appearing from said contract that the said L. Kearney and E. E. Wall are pecuniarily interested in the result of this action, and it not appearing in said affidavit, that said L. Kearney and E. E. Wall, by reason of their poverty are unable to give security for costs of this action. Defendant objects to said affidavit and order by this Court permitting plaintiff and his guardian *ad litem* to prosecute this action without giving security for costs.

W. C. McFARLAND,
H. A. ELLIOTT,
Attorneys for Defendant. [48]

[Endorsements]: No. 107. In the District Court of the United States for the District of Arizona, Sitting at Phoenix, in the State of Arizona. Richard Silvas, an Infant, by Roman Silvas, his Guardian *ad Litem*, Plaintiff, vs. The Arizona Copper Company, Limited, a Corporation, Defendant. Bill of Exceptions. Filed June 24, 1914, at — M. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy. William M. Seabury, Fleming Building, Phoenix, Arizona. [49]

In the United States District Court for the District of Arizona.

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, his Guardian *ad Litem*,
Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED,
a Corporation,
Defendant.

Petition for Writ of Error.

And now comes Richard Silvas, an infant, by Roman Silvas, his guardian *ad litem*, plaintiff in the above-entitled cause, and says that on the 21st day of April, 1914, this Court dismissed the action herein in which order of dismissal and the proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this plaintiff prays that a writ of

error may issue in this behalf, out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the records, proceedings and the papers of this cause, duly authenticated, may be sent to said Court of Appeals.

L. KEARNEY,
W. M. SEABURY,
Plaintiff's Attorneys. [50]

[Endorsements]: In the United States District Court for the District of Arizona. Richard Silvas, an Infant, by Roman Silvas, His Guardian *ad Litem*, Plaintiff, vs. the Arizona Copper Company, Limited, a Corporation, Defendant. Petition for Writ of Error. Filed June 24, 1914, at — M. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy. L. Kearney, Clifton, Ariz. William M. Seabury, Fleming Building, Phoenix, Arizona. [51]

*In the District Court of the United States for the
District of Arizona.*

RICHARD SILVAS, an Infant, by ROMAN SIL-
VAS, His Guardian *ad Litem*,
Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIM-
ITED, a Corporation,
Defendant.

Assignment of Errors.

The plaintiff, Richard Silvas, an infant, by Roman

Silvas, his guardian *ad litem*, in connection with and as a part of its petition for a writ of error filed herein, makes the following assignments of error which it avers were committed by the Court in dismissing the action herein and in the proceedings in said cause before and after the ordering of said dismissal appearing in the records herein, that is to say:

I.

The Court erred in ordering on the motion of the defendant that the plaintiff be required to give bond for security of costs herein in the sum of Two Hundred and Fifty (\$250) Dollars, which motion was opposed by the plaintiff by his guardian *ad litem* on the ground that under the provisions of section 257 of a statute of the State of Arizona entitled an "Act to prescribe the procedure in Civil Actions," etc., approved April 1, 1913, being Senate Bill No. 90, constituting paragraph 646 of the Arizona Revised Statutes of 1913, it is provided that no guardian shall be required in any case to give security for costs, and there is no statute of Congress on the subject. The plaintiff duly excepted to said order. [52]

II.

The Court erred in granting the defendant's motion for security for costs on the ground authorized by Chapter XXIV of said statute of the State of Arizona, entitled an "Act to prescribe the procedure in Civil Actions," etc., approved April 1, 1913, being Senate Bill No. 90 and constituting Title 6, Chapter XXIV, of the Arizona Revised Statutes of 1913, and

in holding that the exception contained in said chapter in favor of guardians *ad litem* was inapplicable to said motion under Section 914 of the Revised Statutes of the United States.

III.

The Court erred in finding and holding that said Section 257 of said Arizona Statute, being Senate Bill No. 90 and providing that no guardian shall be required in any case to give security for costs, is not binding on said Court, under section 914 of the Revised Statutes of the United States, which provides that the Circuit and District Courts of the United States in matters of practice, pleading and forms and modes of proceeding in actions at law shall conform as near as may be to the State practice.

IV.

The Court erred in finding and holding that the Act of Congress of July 20, 1892 (27 Statutes at Large 252 Federal, Stat. Anno. Vol. 2, p. 294), was the sole statute governing the proceedings for security for costs in said court, that said Act covered the whole subject involved in said proceedings, and that therefore said Section 257 of said Arizona Statute being Senate Bill No. 90 and providing that no guardian shall be required in any case to give security for costs had no application to proceedings for security for costs in said court.

V.

The Court erred in dismissing this action. [53]

Wherefore, the defendant prays that for said

manifest errors the judgment of the Court should be reversed.

L. KEARNEY,

W. M. SEABURY,

Attorneys for Plaintiff. [54]

[Endorsements]: In the District Court of the United States for the District of Arizona. Richard Silvas, an Infant, by Roman Silvas, his Guardian, *ad Litem*, Plaintiff, vs. The Arizona Copper Company, Limited, a Corporation, Defendant. Assignment of Errors. Filed Jun. 24, 1914, at — M. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy. L. Kearney, Clifton, Ariz., William M. Seabury, Fleming Bulding, Phoenix, Arizona. [55]

*In the District Court of the United States for the
District of Arizona.*

RICHARD SILVAS, an Infant, by ROMAN
SILVAS, His Guardian *ad Litem*,
Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIM-
ITED, a Corporation,
Defendant.

Order Allowing Writ and Fixing Bond.

And now comes the plaintiff by his attorneys and filed herein and presented to the Court, his petition praying for the allowance of a writ of error, and assignment of errors intended to be urged by him, praying also, that a transcript of the record and proceed-

ings, and papers, duly authenticated may be sent to the United States Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow the writ of error upon plaintiff giving bond, according to law in the sum of Two Hundred and Fifty Dollars.

June 24th, 1914.

WM. H. SAWTELLE,
Judge. [56]

[Endorsements]: In the District Court of the United States for the District of Arizona. Richard Silvas, an Infant, by Roman Silvas, his Guardian *ad Litem*, Plaintiff, vs. The Arizona Copper Company, Limited, a Corporation, Defendant. Order. Filed Jun. 24, 1914, at — M. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy. L. Kearney, Clifton, Ariz., William M. Seabury, Fleming Building, Phoenix, Arizona. [57]

*In the District Court of the United States in and
for the District of Arizona.*

RICHARD SILVAS, an Infant, by ROMAN SIL-
VAS, His Guardian *ad Litem*,

Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED,
a Corporation,

Defendant.

Praeipce for Transcript of Record.

To the Clerk of the United States District Court for the State of Arizona.

You will please prepare a transcript of the complete record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under the Writ of Error to be perfected to said court in said cause, and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Summons and Return,
Amended Complaint,
Answer to Amended Complaint,
Petition for the Appointment of a Guardian
ad Litem,
Order appointing Guardian *ad Litem*,
Consent to Become Guardian *ad Litem*,
Opinion on Motion for Security for Costs,
Transcript of Minute Entries, [58]
Bill of Exceptions,
Petition for Writ of Error,
Assignment of Errors,
Order Allowing Writ of Error,
Bond on Writ of Error,
Writ of Error,
Citation,
Praeipce for Transcript,—

and all other record entries, pleadings, proceedings, papers and filings necessary or proper to make a complete record upon said writ of error in said

cause, said transcript to be prepared as required by law and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

L. KEARNEY,

WM. M. SEABURY,

Attorneys for Plaintiff. [59]

[Endorsed]: In the District Court of the United States, in and for the District of Arizona. Richard Silvas, an Infant, by Roman Silvas, His Guardian *ad Litem*, Plaintiff, vs. The Arizona Copper Company, Limited, a Corporation, Defendant. Praecipe for Transcript of Record. Filed Jul. 1, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [60]

*In the District Court of the United States for the
District of Arizona.*

RICHARD SILVAS, an Infant, by ROMAN SIL-
VAS, His Guardian *ad Litem*,
Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED,
a Corporation,
Defendant.

Bond [on Writ of Error].

KNOW ALL MEN BY THESE PRESENTS:
That we, Richard Silvas, an infant, and Roman Silvas, his guardian *ad litem*, as principals, and National Surety Company, a corporation organized and existing under and by virtue of the laws of the

State of New York and authorized to do business as a surety company in the State of Arizona, surety, are held and firmly bound unto the Arizona Copper Company, Limited, defendant in error in the full sum of Two Hundred and Fifty (\$250) Dollars, the same being the amount of the bond fixed by the District Court of the United States for the District of Arizona by order duly entered on the records of said Court on June 24, 1914, 1914, to be paid to the said The Arizona Copper Company, Limited, defendant in error, its successors, legal representatives or assigns to which payment, well and truly to be made, we bind ourselves, and our and each of our successors, heirs, executors, administrators, legal representatives, jointly and severally by these presents.

Sealed with our seals and dated this, *this day of 8th*, in the year of our Lord one thousand nine hundred and fourteen.

WHEREAS, on the 21st day of April, 1914, at the District Court of the United States for the District of Arizona, [61] in a suit pending in said court between Richard Silvas, an infant, by Roman Silvas, his guardian *ad litem*, plaintiff, and The Arizona Copper Company, Limited, defendant, an order was entered dismissing said action, and the said Richard Silvas, an infant, by Roman Silvas, his guardian *ad litem*, has obtained a writ of error to reverse said order of dismissal in the aforesaid action and filed a copy thereof in the clerk's office of said court, and a citation directed to the said Arizona Copper Company, Limited, defendant, citing and admonishing

it to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, State of California.

Now, the condition of the above obligation is such that if the said Richard Silvas, an infant, by Roman Silvas, his guardian *ad litem*, shall prosecute his said writ of error to effect and answer all costs, if he fail to make said plea good, then the above obligation to be void, else to remain in full force and effect.

And the said bond and obligation is upon the further express condition and agreement by the sureties thereto, that in case of a breach of the condition set forth herein, this Court may upon notice to said sureties of not less than ten days proceed summarily in said action or suit in which this bond is given to ascertain the amount which said sureties are bound to pay on account of such breach of said bond and undertaking and render judgment against the said sureties and each of them and award execution thereon.

RICARDO SILVAS,
NATIONAL SURETY COMPANY,
C. E. PETTINGALL,

Resident Ass't Secy.

ROMAN SILVAS, as said Guardian,
LYSANDER CASSIDY,

Res. Vice-pres.

NATIONAL SURETY COMPANY,

A Corporation Organized and Existing Under and
by Virtue of the Laws of the State of New York

and Authorized to Do Business as a Surety
Company in the State of Arizona.

[Seal of National Surety Co.]

By _____.

The above and foregoing bond approved this 9th
day of July, 1914.

(Signed) WM. H. SAWTELLE,
Judge. [62]

[Endorsements]: No. 107. In the District Court
of the United States for the District of Ari-
zona. Richard Silvas, an Infant, by Roman Sil-
vas, His Guardian *ad Litem*, Plaintiff, vs. The Ari-
zona Copper Company, Limited, a Corporation,
Defendant. Bond. Filed Jul. 10, 1914, at — M.
George W. Lewis, Clerk. By R. E. L. Webb, Dep-
uty. L. Kearney, Clifton, Arizona, William M.
Seabury, Fleming Building, Phoenix, Arizona. [63]

*In the United States District Court for the District
of Arizona.*

No. 107 (Phoenix).

RICHARD SILVAS, an Infant, by ROMAN SIL-
VAS, His Guardian *ad Litem*,
Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED,
a Corporation,
Defendant.

Order Under Rule 16, Section 1, Enlarging Time to August 15, 1914, to File Record Thereof and to Docket Case.

Upon consideration of the application of Mr. George W. Lewis, the Clerk of the District Court of the United States for the District of Arizona, and good cause therefor appearing,

IT IS ORDERED that the time within which the original certified Transcript of the Record in the above-entitled cause may be filed, and within which the cause may be docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and hereby is enlarged to and including the 15th day of August, A. D. 1914.

(Signed) WM. H. SAWTELLE,
Judge of the United States District Court for the District of Arizona.

Dated at Tucson, Arizona, this 1st day of August, A. D. 1914. [64]

[Endorsements]: No. 107 (Phoenix). In the United States District Court for the District of Arizona. Richard Silvas, an Infant, by Roman Silvas, His Guardian *ad Litem*, Plaintiff, vs. The Arizona Copper Company, Limited, a Corporation, Defendant. Order Enlarging Time Within Which to File Certified Transcript of Record. Filed Aug. 1, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [65]

*In the District Court of the United States for the
District of Arizona.*

RICHARD SILVAS, an Infant, by ROMAN SIL-
VAS, His Guardian *ad Litem*,

Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIMITED,
a Corporation,

Defendant.

Writ of Error (Original).

The President of the United States to the Honorable
Judge of the United States District Court for
the District of Arizona, Greeting:

Because in the records and proceedings, as also in
the rendition of an order of dismissal, of a plea which
is in the said District Court before you, between
Richard Silvas, an infant, by Roman Silvas, his
guardian *ad litem*, plaintiff, and The Arizona Copper
Company, Limited, defendant, a manifest error has
happened, to the great damage of the said Richard
Silvas, plaintiff, as by his complaint appears, we
being willing that error if any *hath, shall* be duly
corrected, and full and speedy justice done to the
parties aforesaid in this behalf, do command you,
if order of dismissal be entered, that then under your
seal, distinctly and openly, you send the record and
proceedings aforesaid, with the things concerning the
same, to the United States Circuit Court of Appeals
for the Ninth Circuit, together with this writ so that
you have the same at San Francisco, California, in

said Circuit, within thirty days of the date of this writ, in said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, [66] what of right, and according to the laws and customs of the United States, shall be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this the 24th day of June, A. D. 1914, and of the Independence of the United States the one hundred and thirty-sixth.

Allowed:

WM. H. SAWTELLE,
U. S. District Judge.

[Seal]

GEORGE W. LEWIS,

Clerk of the United States District Court for the District of Arizona.

By Robert E. L. Webb,
Deputy. [67]

[Endorsed]: In the District Court of the United States for the District of Arizona. Richard Silvas, an Infant, by Roman Silvas, His Guardian *ad Litem*, Plaintiff, vs. The Arizona Copper Company, Limited, a Corporation, Defendant. Writ of Error. Filed Jul. 1, 1914, at — M. George W. Lewis, Clerk. By R. E. L. Webb, Deputy. [68]

*In the District Court of the United States for the
District of Arizona.*

RICHARD SILVAS, an Infant, by ROMAN SIL-
VAS, His Guardian *ad Litem*,
Plaintiff,

vs.

THE ARIZONA COPPER COMPANY, LIM-
ITED, a Corporation,
Defendant.

Citation [on Writ of Error (Original)].

The President of the United States to The Arizona
Copper Company, Limited, and to W. C. Mc-
Farland and H. A. Elliott, Your Attorneys,
Greeting:

You are hereby cited and admonished to be and
appear at a session of the United States Circuit
Court of Appeals for the Ninth Circuit, to be holden
at the city of San Francisco, California, in said cir-
cuit, within thirty (30) days from the date of this
writ, pursuant to a writ of error filed in the clerk's
office of the District Court of the United States for
the District of Arizona, wherein Richard Silvas, an
infant, by Roman Silvas, his guardian *ad litem*, is
plaintiff in error, and you are defendant in error,
to show cause, if any there be, why the order of dis-
missal in said writ of error mentioned should not be
corrected, and why speedy justice should not be done
to the parties in that behalf.

WITNESS, the Honorable EDWARD D.
WHITE, Chief Justice of the Supreme Court, this

the 1st day of July, 1914, and of the Independence of the United States the one hundred and thirty-eighth.

WM. H. SAWTELLE,

United States District Judge for the District of Arizona. [69]

Service of a copy of the within citation is hereby admitted.

W. C. McFARLAND,

H. A. ELLIOTT,

Attorneys for Defendant.

Dated 3d day of July, 1914.

[Endorsed]: In the District Court of the United States for the District of Arizona. Richard Silvas, an Infant, by Roman Silvas, His Guardian *ad Litem*, Plaintiff, vs. The Arizona Copper Company, Limited, a Corporation, Defendant. Citation. Filed Jun. 24, 1914, at — M. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy. [70]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the United States District Court for the District
of Arizona.*

United States of America,
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing sixty-five (65) pages, numbered from and including one (1) to and including sixty-five (65), to be a full, true and cor-

rect copy of the record and the whole thereof in the above-entitled suit, No. 107, wherein Richard Silvas, an infant, by Roman Silvas, his guardian *ad litem*, is plaintiff and The Arizona Copper Company, Limited, a corporation, is defendant, said record consisting of "Petition for Appointment of Guardian *ad Litem*"; "Consent to Become Guardian and Order Appointing Guardian"; "Summons and Marshal's Return"; "Amended Complaint"; "Opinion on Motion for Security of Costs"; "Answer to Amended Complaint"; "Bill of Exceptions"; "Petition for Writ of Error"; "Assignment of Errors"; "Order Allowing Writ and Fixing Bond"; "Prae-cipe for Transcript of Record"; "Bond"; and "Order Enlarging Time in which to file Transcript of Record"; and of all of the Minute Entries, as the same appear from the original records thereof, remaining in my office; that pages sixty-six (66) to seventy (70), inclusive, comprise the originals of the "Writ of Error" and the "Citation." [71]

I further certify that the cost for the preparation of this record is as follows, to wit:

Copying 130 folios at 20¢ each.....	\$26.00
Clerk's Certificate, 2 folios at 30¢ per folio.....	.60
Seal of the Court.....	.40

Total.....\$27.00

and that the said Twenty-seven (\$27.00) Dollars was paid by William M. Seabury, Esquire, counsel for the plaintiff.

WITNESS my hand and the seal of said court,
affixed this 12th day of August, A. D. 1914.

[Seal]

GEORGE W. LEWIS,
Clerk.

By Robert E. L. Webb,
Deputy Clerk. [72]

[Endorsed]: No. 2465. United States Circuit Court of Appeals for the Ninth Circuit. Richard Silvas, an Infant, by Roman Silvas, His Guardian *ad Litem*, Plaintiff in Error, vs. The Arizona Copper Company, Limited, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Received and filed August 15, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

**United States
Circuit Court of Appeals
For the Ninth Circuit**

RICHARD SILVAS, an Infant, by
RAMON SILVAS, his Guardian ad
litem,

Plaintiff in Error,

vs.

THE ARIZONA COPPER COM-
PANY, LIMITED, a Corporation,
Defendant in Error.

Brief of Plaintiff in Error

W. M. Seabury

WILLIAM M. SEABURY,

Attorney for Plaintiff in Error,

Fleming Building,

Phoenix, Arizona.

SEP 28 1914

*United States Circuit Court of Appeals for the Ninth
Circuit.*

RICHARD SILVAS, an Infant, by
RAMON SILVAS, his Guardian ad
litem,

Plaintiff in Error,

vs.

THE ARIZONA COPPER COM-
PANY, LIMITED, a Corporation,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

THIS CAUSE IS HERE ON A WRIT OF ERROR DIRECTED TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA TO REVIEW A FINAL JUDGMENT DISMISSING THE PLAINTIFF'S COMPLAINT FOR FAILURE TO FILE AS DIRECTED BY THE COURT BELOW A BOND FOR SECURITY FOR COSTS.

The action was brought in behalf of the infant plaintiff by his guardian ad litem to recover damages for personal injuries received by the infant and resulting from the negligence of the defendant.

The sole basis of Federal jurisdiction in this case is that it presents a controversy in which the requisite amount is involved and one which is between a citizen of the State of Arizona and a corporate alien.

While the cause was pending in the court below and before a trial thereof, the defendant in error moved that plaintiff be required to give security for costs upon the ground that neither the infant nor his guardian ad litem are the owners of property out of which costs could be made on execution sale.

In response to this motion, after withdrawing proof of the plaintiff's poverty and inability to give the desired security, which had previously been filed in opposition to the motion, the plaintiff especially set up and claimed an exemption from the provisions of the state statutes of Arizona (paragraph 643 Civil Code Ariz. 1913) relating to security for costs. This exemption is in favor, among others, of guardians and is found in what is now paragraph 646 of the Civil Code of Arizona, 1913.

The motion was heard on January 21, 1914, and was thereupon submitted to the court, and on March 12, 1914, the court granted the defendant's motion and directed plaintiff to file a cost bond in the sum of two hundred and fifty (\$250) dollars.

The plaintiff failed to file the bond and thereafter a final judgment dismissing the complaint because of such failure was entered.

It is to review and to reverse this judgment that this writ is prosecuted.

POINT I.

The judgment dismissing the action for failure to give security for costs was erroneous.

The assignment of errors presents for determination the question whether a guardian who brings a suit on the law side of the Federal Court in the District of Arizona may lawfully be required to give security for costs because the plaintiff is not the owner of property out of which costs could be made by execution sale.

We will urge upon the court the negative of this proposition and will show that the defendant in this case was not entitled to security for costs from the plaintiff, that the order which required the plaintiff to give such security was erroneous and that the judgment of dismissal, based upon it and upon the plaintiff's failure to give the bond required, should be reversed.

The right to security for costs is wholly statutory.

Re Grade Crossing Comm., 46 N. Y. Supp. 1070-1071, 20 App. Div. 271.

Patterson vs. Burnett, 4 N. Y. Suppl. 921.

Republic of Honduras vs. Soto, 112 N. Y. 310, 313.

Without the existence of statutory authority the Federal Court upon its law side has no inherent or discretionary power to require the giving of security for costs from one litigant to another.

There is no federal statute upon the subject.

There is a federal statute known as the Federal Paupers' Act (Act of Congress, July 20, 1892, 27 statutes at large, 252, Fed. Stat. Anno. Vol. 2, p. 294) which is as follows:

"Section 1. That any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

"Section 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and wilful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury is in other cases.

"Section 3. That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

"Section 4. That the court may request any attorney of the court to represent such poor person, if it

deems the cause worthy of trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

“Section 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases: Provided, that the United States shall not be liable for any of the costs thus incurred.”

This statute, as is obvious from an inspection of it, relates to the subject of pauperism in its relation to the maintenance of litigation in the Federal Courts and in no way tends to prescribe upon what conditions or under what circumstances security for the payment of costs may be required in the Federal Courts of litigants who are not paupers.

The Federal Courts have uniformly applied the statutes of the several states upon the subject of security for costs to motions on the law side of the Federal Courts in the respective states. And this has been done under and by virtue of a proper application of Section 914 of the United States Revised Statutes.

Huginin vs. Thatcher, 18 Fed. 105.

Miller Adv. vs. Norfolk & W. R. Co., 47 Fed. 264.

O'Brien vs. Hearn, 125 Fed. 95.

Scofield vs. Palmer, 134 Fed. 74.

Winkley Co. vs. Bowen Mfg. Co., 185 Fed. 624.

Michigan Aluminum F. Co. vs. Aluminum Co. of
America, 190 Fed. 913.

The subject of security for costs in the State of Arizona is regulated by Chapter 24, Title 6, of the Code of Civil Procedure of Arizona, 1913, paragraphs 643 to 650, inclusive. Paragraph 643 provides:

“643. At any time before trial on motion of the defendant, supported by affidavit showing that the plaintiff is a non-resident of the state or that plaintiff is not the owner of property out of which the costs could be made by execution sale, the court shall order the plaintiff to give security for the costs; and if the plaintiff fail so to do within ten days next after the order is made, the case shall stand dismissed.”

Paragraph 646 of the same Code is as follows:

“646. Neither the state, nor any county thereof, nor any state board or commission or state officer in his official capacity nor any executor, administrator or guardian, appointed under the laws of this state, nor any trustee in bankruptcy shall be required in any case to give security for costs.”

The plaintiff contended below and contends here that he is entitled to the exemption created by paragraph 646 of the Arizona Code, in favor of guardians, and that the Court had no power to require the plaintiff to give security in this case.

Obviously, the only basis for granting the motion is paragraph 643 of the Arizona Code which creates the right in the cases specified. But this statute is expressly

controlled by the exemptions and exceptions contained in paragraph 646 of the same code. The plaintiff was within one of the exempted classes, and especially set up and claimed his exemption which, notwithstanding this, was denied to him.

An analysis of the opinion of the learned court below shows that it is based upon several fundamental errors.

Thus the learned court was of the opinion (A) that it was required to decide whether the Federal Paupers' Act or the exemption created by paragraph 646 of the state statute should control and regulate the decision of the motion.

The determination of this question was approached by a discussion of the well recognized and indisputable principle that when Congress has legislated upon a subject no state legislature may occupy the same field, and by a full discussion of the authorities which indisputably hold that one who seeks the benefits of the Federal Paupers' Act must show not only his own poverty and inability to pay costs, but the inability of all those contingently interested with him in the subject matter as well. And the conclusion (B) was reached that paragraph 646 of the state statute did assume to occupy the same field of legislative activity already occupied by Congress as disclosed by the Federal Paupers' Act. And (C), that failure to comply with the Federal Paupers' Act must

result in the imposition of security for costs as prayed for by the defendant, that the existence of the Federal Pauper's Act prevented the application of paragraph 646 of the state statute to the motion, and because of plaintiff's admitted failure to bring himself within the provisions of the Federal Pauper's Act, the motion for security was granted.

But (A) the question erected by the learned court for determination was not determinative of the motion before it.

It was not the real question before the court for decision. In reality, it was purely fanciful and had no relevancy to the issue.

Paragraph 646 was in reality a part of paragraph 643 of the same code. It created the exceptions to the rule promulgated by paragraph 643. Neither paragraph is complete without the other. Neither can be construed properly alone.

Paragraph 646 was a mere proviso to paragraph 643. Paragraph 646 is an integral and inseparable part of paragraph 643.

This exemption created a statutory right in favor of the plaintiff which it was the duty of the court to recognize and enforce, just as it is the duty of Federal Courts to give effect to other state statutes which create rights, when not in conflict with Congressional legislation.

Darrah vs. Wetter Mfg. Co., 78 Fed. 7.

Harrison vs. Remington Paper Co., 140 Fed. 385.

Lillieanthal vs. Drucklieb, 80 Fed. 562.

If there was any question of possible conflict between the state statute and the Federal Paupers' Act, it was the question whether paragraphs 643 and 646 together were in conflict with the Act of Congress.

The real question was the defendant's right to security for costs upon the ground urged.

This alleged right should have been denied, because the right to security is purely statutory. The right claimed is not derived from any federal statute. If it exists at all, it exists only because of paragraph 643 of the State Code, which is qualified by the exemption contained in paragraph 646 of the same statute, which expressly exempted the plaintiff from the operation of paragraph 643.

We do not dispute that when Congress legislates generally upon any subject within the sphere of its authority, it thereby preempts that field of legislation and no state legislature may occupy the same field thereafter.

Nor do we dispute the rule announced in the authorities cited by the learned court below, that a litigant who seeks to avail himself of the benefits of the Federal Paupers' Act must show the inability of those contingently interested with him in the litigation, as well as his own inability to pay the costs imposed by statute.

But we do dispute the applicability of either principle to the matter before the court.

(B) There was no conflict between paragraph 646 of the Federal Paupers' Act nor between paragraphs 643 and 646 of the Arizona Code and the Act of Congress.

The subject upon which Congress legislated when it enacted the Paupers' Act was who might sue as paupers, and of course those who might sue as such could not be required either to pay or give security for the payment of the fees imposed by law upon others.

The subject was who were paupers within the Act, not the grounds upon which those who were not paupers might be required to give security for costs.

Consequently, the only legislative field occupied by Congress by the enactment of this statute was the creation of a class of statutory paupers, namely, the persons therein specified and those whom the courts construe to be within the purview of that statute.

The exemption from the payment of costs was a mere incident to the right of paupership, and Congress did not assume to legislate generally upon the subject of security for costs, nor did it create an exclusive class from whom costs could not lawfully be ~~enacted~~^{exactd}, in the Federal Courts.

Nor did the state attempt by paragraph 643 or 646,

or both, to enter the same legislative domain already occupied by Congress by the enactment of the Paupers' Act.

The state dealt with the right to sue in *forma pauperis* by another statute, namely, paragraph 645 of the Arizona Code, and in so far as a plaintiff on the law side of the Federal Court might seek to avail himself of the provisions of paragraph 645 of the Arizona Code, to avoid a compliance with the Federal Pauper's Act, such statute would clearly be inapplicable in the Federal Courts.

But no attempt was or is made by the plaintiff in this case either to avail himself of the provisions of paragraph 645 of the Arizona Code or of the provisions of the Federal Paupers' Act.

But if, as asserted by the learned court below, paragraph 646 does conflict with the Federal Paupers' Act, upon what ground can the motion for security properly have been granted?

As we have shown, the alleged right to security is dependent upon the state statute, and paragraph 646 is only a part of paragraph 643, and both must be read together as one statute.

If for any cause the state statute is inapplicable to the defendant's motion for security, whence comes the power of the court to grant the motion?

Moreover, on the second branch of this discussion

(C), namely, the failure of the plaintiff to bring himself within the Federal Pauper's Act, the matter decided by the learned court below was not before the court for determination.

The failure of the plaintiff to bring himself within the Federal statute is admitted.

The affidavit of poverty submitted by the plaintiff in the first instance was expressly withdrawn from the learned court's consideration. No reliance was placed upon nor was any benefit sought from the Federal Paupers' Act. There was no application before the court for leave to sue in *forma pauperis*.

Nevertheless, the questions which would have been involved, had reliance been placed upon this statute, were decided by the learned court lest, as the court expressed it in substance, they might subsequently be presented for determination.

It seems inevitable that an erroneous conclusion should have resulted from such faulty premises, and we respectfully submit that the conclusion reached by the learned court was erroneous.

It was erroneous because assuming the valid applicability of the paragraph 643 to the motion and that the court properly, though unconsciously, gave that paragraph force and effect in granting the motion, nevertheless the court separated from it paragraph 646, which in reality is an integral and inseparable part of it, and

then erroneously held paragraph 646 to be in conflict with the Federal Pauper's Act, and moreover granted the motion, although a logical pursuit of the court's reasoning shows that if paragraph 646 was invalid in its application to the Federal Court because of conflict with the Federal Paupers' Act, being in reality only a part of paragraph 643 from which the only claim of right to security flows, paragraph 643 would also be in conflict with the Federal Act, and hence the only authority to grant the motion is by the court's own process of reasoning swept away.

But finally the result was erroneous because it afforded to one litigant the benefits of the state statute and denied its benefits to another.

The defendant was allowed to obtain security for costs under paragraph 643 of the Arizona Code, while the plaintiff was denied the exemption contained in paragraph 646 of the same statute.

In other words, it was decided that the defendant was entitled to the benefits of this statute, but that the plaintiff was not.

We do not know to what this remarkable elasticity in interpretation is attributable.

We know of no authority for it.

We are unable to perceive or recognize any principle of logic or reason from which it springs or by

which it may be supported. We are unable to reconcile its striking and apparent inconsistencies.

We are led to the irresistible conclusion that no reasonable basis for it exists.

We think plain error was committed in the ruling that gave to the defendant something to which, as we have shown, it was not entitled. The effect of the ruling was to drive from a national court a litigant who claimed his right to litigate there his controversy with a subject of a foreign country found within the state, rather than in a court of the state in the county in which the defendant had its principal place of business.

The decisions which comment on the reasons why Congress conferred upon the citizens of the several states the right to select a Federal forum for the determination of their disputes with citizens of different states, show that such a privilege was and is a fundamental right which no Federal court may deny to any litigant entitled to it.

The effect of the ruling complained of was to deny this right to the plaintiff, who was, as we have shown, entitled to it.

Since the defendant was not entitled to security for costs, the order requiring the plaintiff to give security was erroneous and the judgment of dismissal based upon it should be reversed with costs.

But there is another aspect of the case which appeals strongly to us and a further reason why the motion for security should have been denied.

The application of state statutes upon the subject of security for costs in the Federal Court is obviously subject to the qualification that if a particular statute in effect imposes upon a litigant a condition precedent to his right to sue in a national court, which condition is not imposed upon him by Congress, the state statute to that extent may not be applied to proceedings in the Federal Court, because no state is competent to limit or in any way to restrict the rights conferred upon citizens by Congress to have free access to the courts of the nation and to litigate in those courts their controversies, subject only to the provisions of the Federal statutes.

We are not concerned in this instance with the provision of paragraph 643, so common in the statutes of other states, which requires security for costs of a non-resident plaintiff, but with the provision that, if the plaintiff is not the owner of property out of which the costs could be made on execution sale, the court shall order the plaintiff to give security for costs, we are concerned.

We think this provision of the statute may not lawfully be applied to actions in the Federal Court for the reason suggested.

We think such an application of the statute clearly

imposes a property qualification upon the right to maintain litigation in the Federal Court foreign to any act of Congress.

Congress authorized a plaintiff to file and maintain his suit in a Federal Court in any case in which the matter in controversy exceeds in value, exclusive of interest and costs, the sum of three thousand (\$3,000) dollars and is between citizens of different states or citizens of a state and aliens.

Congress did not add the proviso that if the plaintiff is not the owner of property out of which costs could be made on execution sale, the court should have power to require the plaintiff to give security for costs as a condition precedent to the maintenance of litigation by such a litigant. If such a proviso is applicable to the Federal Courts, then an additional prerequisite to the right to maintain suits in such court is created not by Congress but by the legislature of a state. The mere fact that plaintiff had no property out of which costs could be made on execution sale would not have entitled him to sue as a pauper in the Federal Court. To avail himself of the paupers' act, he must not only establish his own poverty and inability to pay costs, but also that all those having an interest in the subject matter of the litigation are likewise unable to give security for costs, and he must comply with the other expressed provisions of the paupers' act.

Boyle vs. Great No. Railway Co., 63 Fed. 539.

Feil vs. Wabash R. R. Co., 110 Fed. 490.

Reed vs. Pa. Co., 111 Fed. 714.

Phillips vs. Louisville and N. R. Co., 153 Fed.
795.

Consequently, to apply the provision of paragraph 643 of the Arizona Code to the Federal Courts is simply to impose a property qualification upon the right to sue in the Federal Court, which is unauthorized and which no state legislature has the power or authority to impose upon those lawfully litigating their controversies in the Federal Court.

A great variety of statutes of the several states, which have directly or indirectly sought to embarrass the institution and maintenance of litigation in the Federal Courts, have uniformly been held by Federal Courts to be wholly inapplicable to the Federal Courts.

Their invalidity when applied to Federal Courts has been repeatedly recognized.

Barber Asphalt Paving Co. vs. Morris, 132
Fed. 945.

Clark vs. Bever, 139 U. S. 96-102.

Tullock vs. Mulvane, 184 U. S. 497.

Ins. Co. vs. Morse, 20 Wall. 445.

Harrison vs. St. Louis, etc., R. Co., 232 U. S. 318.

Mo. Pac. R. Co. vs. Larabee, 34 Sup. Ct. Rep.
979, 984.

In the case last cited a state statute, which assumed to authorize the recovery in a state court of costs by way of compensation for services rendered by attorneys in the prosecution of mandamus proceedings before the Supreme Court of the United States, was held to be unenforceable in the Federal Courts, among other reasons because such a statute imposed a burden upon litigants in the Federal Courts which the state legislature was without power to impose.

So in *Barber Asphalt Paving Co. vs. Morris*, 132 Fed 945, Judge Sanborn said:

“Whenever the citizens of a state may secure a trial and decision of their controversies in its courts either by original suits, by appeals or by other proceedings, citizens of different states have the right to the determination by the courts of the United States of like controversies between them which involve the requisite amount; and no state by conferring exclusive jurisdiction of such controversies upon its own courts, by prescribing exclusive methods of commencing litigation, by prohibiting the payment of claims save upon the order of its own courts or by any other means, may strike down that right or take away the plenary power of the national courts to enforce their lawful adjudications.”

(Citing many authorities.)

In this case a provision of a city charter which prohibited officers of the city from paying the claim of the claimant pending appeal without the order of the state court was held not to impair in any way the jurisdic-

tion of the Federal Court to proceed to trial and to enforce any judgment it might render in the premises.

In other words, the complete inapplicability of that particular state statute to proceedings in the Federal Court was recognized and adjudicated.

Bever vs. Clark, 139 U. S. 96, 102, involved the familiar discussion of the right of citizens of different states to litigate in the National Courts a claim against a decedent's estate when the state legislature had declared that the probate courts of its state should have exclusive jurisdiction of such suits.

It was held that these provisions of the state statute were wholly inapplicable to the Federal Courts.

In other words, such statutes are inoperative when attempted to be applied to proceedings in the Federal Courts, and the Federal Courts have uniformly nullified such statutes in their application to such courts.

Tullock vs. Mulvane, 184 U. S. 497, holds that attorneys' fees are improperly included as damages recoverable for the breach of an injunction bond given in a Federal Court, notwithstanding the existence of a state statute which authorizes the recovery of such fees as damages in such cases.

And in *Insurance Co. vs. Morse*, 20 Wall. 445, the Court held that a state statute which required foreign insurance companies desiring to transact business in the

state to agree not to remove suits against it to the Federal Court, obstructed the right of free access to the Federal Courts conferred by the Constitution of the United States, and hence was void.

In principle, we are unable to distinguish the cases to which we have directed attention and the many cases cited in these authorities from the case at bar. In the case at bar the application of the state statute to proceedings on the law side of the Federal Court supplies and affords a means of ousting litigants, who are otherwise qualified to maintain their suit in the Federal Court, from the courts of the nation. And this means is created not by act of Congress but by a mere state legislature. Indeed, the application of this statute to the Federal Court creates a special class of litigants in Arizona who may not have their controversies with citizens of other states determined by the Federal Court in that district. A litigant might well not be possessed of tangible property out of which costs of the litigation might be made on execution sale and yet not be a pauper within the meaning of the Federal Pauper's Act. Such a litigant would be unable to avail himself of the provisions of the Pauper's Act. Such a litigant, not having property out of which costs could be made on execution sale, might well be wholly unable to give security for costs, and upon such failure he is deprived of his right to litigate his controversy in the national courts.

Suppose for the sake of illustration that the state

statute had provided that no one should maintain litigation in the courts of the state unless he had on deposit within the county the sum of five thousand (\$5,000) dollars. Would any one seriously contend that such a statute could be applied under the Conformity Act to proceedings in the Federal Court of that district? And if so applied, is there any possibility that such an application of the Conformity Act would be sustained? It may be said in response to this illustration that such a requirement would be clearly unreasonable, and for that reason the Federal Courts would decline to follow and adopt the state statute. But we respectfully submit that the test of applicability of a state statute to proceedings in the Federal Court, when that statute assumes to regulate and to prescribe conditions upon the performance of which alone, litigation may be maintained in the state court, does not depend upon the reasonableness of such state legislation, but upon the total absence of power in the state legislature to deal with such a subject in its application to the Federal Courts.

It is clear from a reading of the Paupers' Act that Congress merely wished to assure to paupers in every state the right of free access to the Federal Court. It did not care to have the right of this class, as the rights of other litigants are, dependent upon state statutes, made applicable to the Federal Court by the Conformity Act. The subject of the act was the rights of paupers, not the rights of those who were not paupers.

But it is also clear that Congress did not intend that the rule of statutory construction "*Expressio unius est exclusio alterius*" should be applied to it.

Because it exempts paupers it did not prohibit the existence of other exemptions found in state statutes made applicable by the Conformity Act in favor of those who were not paupers, nor did it render legislation by it unnecessary when it determined that it wished to exempt other classes not specified in the Paupers' Act.

For example, the exemption created by Sec. 1001 of the U. S. R. S. in favor of Federal officers who institute suits pursuant to instructions from the department of justice.

The rule of construction is inapplicable. If it were applicable the passage of Sec. 1001 would have been unnecessary.

But it may be suggested that if this reasoning be sound it would apply with equal force to that part of the statute which permits the imposition of costs upon a non-resident plaintiff. It will be pointed out that since the earliest time, at least since 1792, the right of the Federal Courts to require security of non-resident plaintiffs has been evidenced by repeated instances of its enforcement, and today it will be said that the right is further guaranteed by the rule of the District Court (Rule 77), which expressly provides that non-residents shall be required to give security.

We wish to meet the argument upon the merits.

We say we are unable to distinguish in principle between the requirement of security because of non-residence or because of lack of property, except that the right to require security of a non-resident plaintiff, whether at law or in equity, seems to exist here as in England without any statute or rule of court as a part of the common law. (11 Cyc 171.)

Indeed, we are quite unable to see how a state statute imposing upon non-residents the burden of supplying security for costs with the penalty of dismissal for failing to give it even when fortified with a court rule to the same effect, can be applied to the Federal Court without embarrassing the maintenance of litigation in that court to that extent. So far as the court rule is concerned the power to make such rules, while doubtless inherent to some extent, is derived from Sec. 918 of the Revised Statutes.

But even this authority is to be exercised in conjunction with a proper observance of the Conformity Act and we do not understand that by a mere court rule the court could nullify the provisions of the Conformity Act and by so doing make rules for the guidance of practice and procedure on the law side of the court contrary to the state statutes which are applicable under the Conformity Statute.

Importers and Traders Natl. Bank vs. Lyons,
134 Fed. 510.

So far as the state statute is concerned, when applied in the Federal Court logically, we think it imposes a clear embarrassment and impediment to the maintenance of litigation in the Federal Courts not authorized by Congress, but in reality in conflict with the provisions of the Judicial Code.

Section 51 of the Judicial Code expressly authorizes the institution of suits in the district of the residence of the defendants by non-resident plaintiffs. It imposes no proviso that the plaintiff shall upon request file security and in default thereof shall be dismissed.

In *Woods vs. Bailey*, 111 Fed. 121, the point suggested itself to Judge Archibald who said, "It does not seem altogether consistent with the statutes which give jurisdiction on the ground of diverse citizenship, but the point is not raised and I do not pass upon it."

It was considered in *Miller's Administrators*, 47 Fed. 264, but we respectfully submit the decision against the contention is poorly reasoned.

The fears there expressed that unless security was required the public officers would go unpaid is wholly without foundation. The Federal statutes expressly provide that the officers of the court need not render any statutory service until their lawful fees are tendered to them—a practice which is uniformly followed in this jurisdiction with sedulous fidelity. Nor would the litigant be remediless as the court supposed in such a case.

The ancillary jurisdiction of the equity side of the court is always open to litigants oppressed by any of the rigors and hardships of the common law and an injunction to restrain the prosecution of an action at law, if vexatiously brought or if maintained at needless or extravagant expense to the defendant without probable hope of success on the part of the plaintiff, would present a proper basis for the exercise of a judicial discretion not vested in the law side of the court in matters of this kind.

Karns vs. Imlay Rapid C. Process Co., 181 Fed.
751.

When it is recalled that the costs of Federal litigation are infinitely greater than those exacted from the litigant in the state court, when we are reminded that the fee bill in this jurisdiction still exacts from litigants double the amount exacted of litigants in other parts of the country, when we realize that the costs of an ordinary trial, including the mere clerical certification of documents for appellate review, amounts to sums substantially in excess of one hundred (\$100) dollars, while the cost of printing for appellate purposes exceeds several hundreds of dollars, such a provision, if applied to the Federal Court, can hardly be regarded as an encouragement to litigate in that court. In this jurisdiction the requirement of security is often tantamount to a denial of the right of access to the Federal Court. In reality it is an impediment, an obstacle created by the state leg-

islature and given efficacy by its application to the Federal Court by the learned judge in supposed compliance with the demands of the Conformity Act. But if this be lawful, why was the statute of the State of Kansas, which provided for the recovery of attorneys' fees for services rendered in the prosecution of mandamus proceedings before the Supreme Court of the United States, held to be a clearly unauthorized impediment placed in the approach to that august tribunal which tended to deprive litigants of the exercise of their right of free access to our National courts? *Mo. Pac. R. Co. vs. Larabee*, 34 Sup. Court Rep. 979, 984.

That it has been customary is no response. Error, however long perpetuated, never becomes right.

We have been unable to find any case except those cited where the question was squarely presented for review.

It is presented here in part but not as to the provision relating to non-residents.

We, therefore, contend that paragraph 643 of the Arizona Code is inapplicable to applications for security for costs on the law side of the Federal Court in Arizona, on the ground urged since, as we have shown, the right to security is statutory, and there is no Federal statute requiring the plaintiff to give such security, and the state statute is inapplicable for the reason stated.

It follows that the defendant's motion should

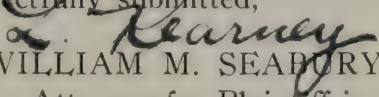
have been denied upon this ground. But assuming that the state statute is applicable to motions of this character on the law side of the Federal Court in Arizona, nevertheless, the order complained of was erroneous and should be reversed because the defendant was accorded the benefits of the state statute while the benefits of a part of the same statute were denied to the plaintiff.

We think the decision clearly unjust in either aspect of the case.

It presents an obvious discrimination between litigants which has no place in the administration of justice, and when it results from a particular construction of a statute affords a positive and convincing demonstration that such a construction is fundamentally erroneous.

For the reasons stated the judgment should be reversed with costs.

Respectfully submitted,


WILLIAM M. SEABURY,
Attorney for Plaintiff in Error,
Fleming Building,
Phoenix, Arizona.

San Francisco, October,
1914.



IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

RICHARD SILVAS, an Infant by
RAMON SILVAS, his Guardian
ad litem,

Plaintiff in Error.

vs.

THE ARIZONA COPPER
COMPANY, LIMITED,

Defendant in Error.

2465

BRIEF OF DEFENDANT IN ERROR

W. C. McFARLAND,
Attorney for Defendant in Error,
Clifton, Arizona.

Filed this _____ day of _____ 1914

Filed

Clerk.

By SEP 24 1914

Deputy Clerk.

F. D. MONTGOMERY,
Clerk.

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BRIEF OF DEFENDANT IN ERROR

The record in this case discloses that the attorneys of Plaintiff in Error are prosecuting this action under a written contract by the terms of which they are to receive Fifty Per Centum of the amount recovered by suit or compromise in full compensation for their services, in fact, it was admitted by Plaintiff in Error and his counsel in the court below that such a contract existed and the fee for their services in this case was contingent on the amount recovered by suit or compromise.

The contention of Plaintiff in Error is that neither the infant plaintiff nor his guardian ad litem should be required to give security for costs for the reason that under the Revised Statutes of Arizona, 1913, neither guardians nor guardians ad litem are liable for costs nor shall in any case be required to give security for costs. The several provisions of the Revised Statutes of Arizona on this subject will be found in the following paragraphs:

Par. 414: "No person shall be appointed as guardian ad litem except upon his written consent, and he shall not be liable for costs, unless by special order of the court for some misconduct therein."

Par. 646: "Neither the state nor any county thereof nor any state board or commission or state officer in his official capacity nor any executor, administrator or guardian, appointed under the laws of this state nor any trustee in bankruptcy shall be required in any case to give security for costs."

This contention of Plaintiff in Error is based on Sec. 914 of the Revised Statutes of the United States, being Section 5 of the act of June 1, 1872, Chap. 255, 17 Sta. at Large 197 (U. S. Comp. Stat. 1901, page 684 Rev. Stat. Anno. Vol. 2, p. 1432) commonly called the "Conformity Statute" which provides:

"The practice, pleadings, and forms and modes of procedure in civil cases, other than in equity and admiralty cases, of the circuit and district courts, shall conform as near as may be

to the practice, pleadings and forms and modes of procedure existing at the time in like cases in the courts of record of the State in which such circuit or district courts are held. Any rule of court to the contrary notwithstanding."

Defendant in Error contends that Congress by act of July 20, 1892 has covered the entire field of costs and the mode and manner of securing the same. Hence, the sole question presented for decision is whether the several provisions of the Arizona statute in respect to costs and security therefor are controlling in cases pending in the Federal Courts in the states where such courts are held or whether the act of Congress of July 20, 1892 which specially provides for costs and security therefor furnishes the guide for Federal Courts on this subject. Defendant in Error contends that the Act of July 20, 1892 covers the entire field of costs and the mode and manner of securing the same; that this act is made specially applicable to Federal Courts sitting in the particular state. The uniform current of decisions of the Federal Court is that in such a situation the act of Congress is the sole guide and the provisions of the state law are inapplicable. The universal rule being that when Congress has legislated upon the same subject covered by State Statutes that such Federal legislation is exclusive and the sole guide for Federal courts sitting in a particular state. As said by Mr. Justice Gray in the case of *Southern Pacific Ry. Co. vs. Denton*, 146 U. S. 202 (56 L. Ed. 942) speaking for the Court on page 209:

"And whenever Congress has legislated upon any matter of practice and prescribed a definite rule for the government of its own courts, it is

to that extent exclusive of the legislation of the State upon the same matter."

In the case of *Luxton vs. North River Bridge Company*, 147 U. S. 337 (37 L. Ed. 194) the court on page 338 very clearly states the rule in the following language:

"This direction that the proceedings in the Circuit Courts of the United States shall 'conform as nearly as may be to the practice in the courts' of the state must of course like the corresponding direction as to practice, pleading and procedure in Sec. 914 of the Revised Statutes of the United States, give way when to adopt the State practice would be inconsistent with the terms, defeat the purpose or impair the effect of any legislation of Congress."

To the same effect are the following cases:

I. & St. L. Ry. Co. vs. Horst, 93 U. S. 291-300 (28 L. Ed. 898.)

Whitford vs. Clark Co., 119 U. S. 522-525 (30 L. Ed. 500).

In re Fisk 113 U. S. 713-720 (28 L. Ed. 1117).

Chateaugay Co. Petitioner, 128 U. S. 544-554 (32 L. Ed. 508).

Mex. Cent. Ry. Co. vs. Pinkney, 149 U. S. 194-206 (37 L. Ed. 699).

Shepard vs. Adams, 168 U. S. 618-626 (42 L. Ed. 602).

Hefley vs. Ry. Co., 158 U. S. 98-105 (39 L. Ed. 910).

Chappell vs. U. S. 160 U. S. 499-514 (40 L. Ed. 510).

St. Clair vs. U. S., 152 U. S. 134-154 (38 L. Ed. 936).

Western L. & S. Co. vs. Butte C. M. Co., 210 U. S. 368-369 (52 L. Ed. 1101).

Kelsey vs. Forysth, 21 Howard 85 (16 L. Ed. 32).

Galloway vs. Ft. Worth Bank, 186 U. S. 177-178 (46 L. Ed. 1111).

Phelps vs. Oaks, 117 U. S. 236-239 (29 L. Ed. 888).

Lincoln vs. Powers, 151 U. S. 436-443 (38 L. Ed. 224).

Potter vs. Bank, 102 U. S. 163-165 (26 L. Ed. 111).

Interstate Com. Co. vs. Ry. Co., 167 U. S. 633-642 (42 L. Ed. 306).

Hills Co. vs. Hoover, 220 U. S. 329 (55 L. Ed. 485).

In the Hoover case above cited is the last expression so far as we are advised of the Supreme Court of the United States on this subject. Mr. Justice Day delivering the opinion on page 336 says:

“This section (914) is intended to secure on the law side of the Federal Courts, practice which prevails in like causes in courts of the States. It's requirement is that such proceedings shall conform ‘as near as may be’ to that prevailing in the state courts ‘in like cases.’ This section was not intended to require the adoption of state practice where it would be inconsistent with the terms or defeat the purposes of the legislation of Congress.”

That the U. S. Circuit Courts of Appeal and Federal, Circuit and District Courts by uniform current of decisions are in accord with the Supreme Court of the United States in its construction and interpretation of the "Conformity Statute" is shown by the following cases:

- Lange vs. U. P. Ry. Co., 126 Fed. 338-340.
- Webb vs. Goldsmith, 127 Fed. 572.
- Swift vs. Jones, 145 Fed. 480-491.
- Booth vs. Denike, 65 Fed. 43-46.
- U. S. vs. Nat'l. Lead Co., 75 Fed. 94-95.
- U. S. vs. Eisenbeis, 112 Fed. 190-196.
- Weller vs. Penn. Ry. Co., 113 Fed. 502-506.
- Millers Admr. vs. Norfolk & W. Ry. Co., 47 Fed. 264-265.
- Van Doren vs. Penn Ry. Co., 93 Fed. 260-268 to 271.
- O'Connell vs. Reed, 56 Fed. 531-534 to 539.
- Tyron vs. Penn. Ry. Co., 213 Fed. 49.
- U. S. Ex rel Coquard vs. Indian G. D. Dist., 85 Fed. 928-930.
- Seeley vs. K. C. Star Co., 71 Fed. 554.
- U. S. Ex rel vs. Arnold, 69 Fed. 987-992.
- Martindale vs. Waas, 11 Fed. 551.
- Chic. N. W. Ry. Co. vs. Kendall Co., 167 Fed. 62-64 et seq.
- Hughey vs. Sullivan, 80 Fed. 72-74.
- City of Manning vs. German Ins. Co., 107 Fed. 52-57.
- Collin Co. National Bank vs. Hughes, 155 Fed. 389-394.
- Williamson vs. L. L. & Globe Ins. Co., 141 Fed. 54-58.
- Erstein vs. Rothchild, 22 Fed. 61-64.
- Wall vs. Chesapeake & O. Ry. Co., 95 Fed. 398-401.

Consumers Cotton Oil Co. vs. Vashburn, 81 Fed. 331-333.

Walker vs. Collins, 50 Fed. 737-739.

O'Neil vs. K. C. S. & M. Ry. Co., 31 Fed. 663.

Menge vs. Warriner, 120 Fed. 816.

City of St. Charles vs. Stookey, 154 Fed. 772-778.

Allnut vs. Lancaster, 76 Fed. 131-134.

In Truckee River Gen. Elec. Co. vs. Benner, 211 Fed. 79 on page 81, Mr. Circuit Judge Gilbert speaking for the Court states the rule as follows:

“Although Sec. 914 of the Revised Statutes (U. S. Comp. Stat. 1901, page 684) requires the District Courts of the United States in matters of practice, pleadings and forms, in actions at law to conform as nearly as may be to the State practice, Sec. 954 of the R. S. (U. S. Comp. Stat. 1901, page 961) contains the legislation of Congress on the subject of amendments to pleadings in Federal Courts and is paramount to the local State statute.”

The legal and logical conclusion from the cases cited being that when Congress has legislated upon any particular matter of practice and prescribed a definite rule for the government of its courts, it is to that extent exclusive of the State legislation upon the same matter. It becomes material to consider what is required by the congressional legislation in respect to affidavits of parties who seek to relieve themselves from paying costs or giving security therefor. Under Sec. 1 of the Act of Con-

gress, July 20, 1892 (27 Stat. at Large 252) the requisites of the written statement required by Section 1 of this act have frequently been before the Federal Courts for construction and interpretation. The uniform ruling of these courts in respect to the requirements of the written statement is, that when it appears that the action is being prosecuted by attorneys for a contingent fee the affidavit of the party that he is unable to pay or give security for costs is insufficient, unless it contains the further statement that there is no other person interested by contract or otherwise in the cause of action or entitled to share in the recovery, who is able to pay or secure the costs.

In *Boyle vs. Great Northern Ry. Co.*, 63 Federal 539, the court says:

"There is no question but what a poor person can prosecute his cause and obtain a full hearing, but at the same time litigation is not to be fostered and encouraged by allowing the plaintiff to evade any expense which he makes. That is a duty of any party having sufficient means, and is not to be evaded. If he is not able to pay costs or give security for them, he can have justice without it. But a person who acquires by contract an interest in any litigation, and a right to share in the fruits of a recovery, and who is not entitled to sue in forma pauperis, cannot be permitted, under cover of the name of a party who is a poor person, to use judicial process and litigate at the expense of other people. I think it does make a difference whether the plaintiff has made a contract with his counsel for their compensation. It makes this difference: That, after a contract has been

made with counsel for a pecuniary interest in a lawsuit, the case is carried on partially for their benefit; and, if they are able to pay the expenses of the litigation, it is unjust for the court to allow the litigation to go on for their benefit, without expense, on the pretense that the plaintiff is unable to pay, and that there is no other person interested, by contract or otherwise, in the cause of action, or entitled to share in the recovery, who is able to pay or secure the costs. I think that such a rule is in keeping with the meaning and spirit of this law, and it is founded in reason."

In *Feil vs. Wabash R. Co.* 119 Fed. 490, it was disclosed that the case was being prosecuted by the plaintiff's attorney on contingent fees. Speaking of the effect of such contract or contingent fees on the right of the plaintiff to be relieved of costs under the act of July 20, 1892, the court held that in such cases the plaintiff represents, not only her own interest, but also that of the attorneys in the case, and she sues for herself and as trustee for others, and standing in this position, she could not be held to be poor within the meaning of the law, unless the beneficiaries are poor also. The court concludes:

"No petition to sue as a poor person can avail, unless it discloses that all the beneficiaries, as well as the nominal plaintiff, come within the purview of the act."

In the case of *Phillips vs. Louisville & N. R. Co.* (C. C.) 153 Fed. 795, is a full and able discussion of the objects to be of interest as a clear statement of the law:

"This statute is of a charitable and beneficent nature. Its sole purpose is to enable persons, who in good faith are unable, on account of poverty, to prosecute any suit or action in the courts of the United States, to obtain a fair chance to have the rights adjudicated. It is not intended that the statute should be used directly or indirectly to benefit those who are able to prosecute their suits. The citizen seeking the benefit of the statute, and making the affidavit of poverty required thereby, must of necessity be the only person benefited by his cause of action. It surely was never intended by the statute that two or more persons should be interested financially in the result of a suit or action brought, and that, if one of them happens to be without means, this one can be permitted to make an affidavit of poverty and secure the benefits of the statute for the other parties to the suit, who are able to prosecute same, even though they may not appear by name as parties

The admission by the attorneys for the plaintiff that they were interested to the extent of one-third of any amount that might be recovered made them financially interested in the result of the lawsuit, and, unless they, too, could make and file an affidavit as to their poverty, the plaintiff in this cause could not obtain the benefit of the statute."

On the subject of parties suing in a representative capacity, the Circuit Court of Appeals for the Sixth Circuit speaking through Mr. Circuit Judge Lurton (the late Mr. Justice Lurton of the Supreme Court of the United States) in the 111 Fed.

716 uses this language as to what an affidavit under this law must disclose:

"The affidavit in this case is defective in this: The suit is that of the widow and administratrix of Frank Reed who sues for damages consequent upon the tortious killing of her intestate and husband. Under the Ohio statute authorizing such an action, the damages recoverable are for the benefit of the widow and children of the deceased, and they are the real parties in interest.

Bates' Ann. St. Ohio, Par. 6135. The beneficiaries and real parties in interest are therefore the widow and the children of the deceased. The affidavit shows sufficiently the poverty of the widow, but is defective in not making a like showing in behalf of the children of the deceased. It may be that the estate of the deceased is able to prepay the costs of the writ of error, or secure the same. If so, the act would have no application. The affidavit makes no showing as to the value of the estate of which the plaintiff is administratrix. The application is for these reasons denied but without prejudice to its renewal upon an affidavit showing that the estate of the deceased, as well as the beneficiaries, is unable to pay the costs or give security."

In the case of *Volk vs. B. F. Sturtevant Co.*, 99 Fed. 532, which was also a case prosecuted by an Administrator, the Court of Appeals, First Circuit holds under the act of July 20, 1892 (27 Stat. at Large 252):

"To authorize the granting of leave to pro-

ceed in forma pauperis under such statute it must be shown that the petitioner is a citizen of the United States and where he sues as a representative of the decedent the financial condition of the estate as well as his own must appear; and in as much as the statute is expressly limited to those who are unable to pay the fees and costs of the suit or give security for the same, a showing of inability and not merely inconvenience or hardship is essential."

In *Clay vs. Southern Ry. Co.*, 90 Fed. 472, a case prosecuted by an administrator, the Circuit Court of Appeals for the Sixth Circuit in respect to security for costs under the act holds as follows:

"*PER CURIAM*: This petition must be denied because it does not appear therefrom that the persons who claim to be the beneficiaries and the real parties in interest in the cause of action are paupers and unable to pay the ordinary costs of the proceedings in error. It is not sufficient in a suit brought by one in a representative capacity as in the case with such suits under the Tennessee statutes, to make it appear that in his representative capacity he has not funds with which to prosecute the suit. It must also appear that those persons who will enjoy the fruit of the litigation, and who are the real parties in interest, are also in such condition of poverty that they cannot pay the costs of that which is done for their benefit. The application is therefore denied, without prejudice to its renewal, upon an affidavit which shall remedy the defect herein pointed out, within thirty days."

In the case of *Esquibel vs. A. T. & S. F. Ry. Co.*, 206 Fed. 863 which was a case prosecuted in a representative capacity, District Judge Pope for the District of New Mexico in passing upon the motion for security for costs under the act of July 20, 1892 in respect to the right to sue without security for costs, where the attorneys are prosecuting the case upon a contingent fee states the rule as follows:

"The question raised is whether under such circumstances the showing for leave to sue in forma pauperis must include a showing that the attorney has an interest in the result of the case as well as the plaintiff and other beneficiaries (she suing as administratrix) is unable to give security for costs. The Federal authorities which have construed the law on the subject above cited are unanimous in the holding that the showing to be complete must be to the effect, not only that plaintiff herself is unable to furnish security, but that all persons interested in the result of the suit must likewise be shown to be thus unable to furnish security."

It would seem the above cases interpreting and construing the act of Congress of July 20, 1892 would be conclusive on this subject under the well established rule of statutory construction that "all laws must be held to convey that meaning which is given them by the construction of the courts."

Holt vs Bergevin, 60 Fed. 1-3.

There may be cases seemingly holding a contrary view to the cases cited in the Federal Courts but it will be found that such decisions were rendered either prior to the Act of 1892 or that

the State statute on the subject of procedure has been adopted by some rule of court.

U. S. vs. Breitling, 20 How. 252 (15 L. Ed. 900).

Federal Courts in some districts, and particularly New York have by rule adopted the practice act of the state of New York and in that jurisdiction it has been held that the New York court of procedure adopted by the court is the rule in respect to requiring security for costs.

Hugunin vs. Thatcher, 18 Fed. 105.

Windkley Co. vs. Bowen Mfg. Co., 180 Fed. 624.

Or where a state rule of property is involved.

Bacon vs. The W. W. M. Life Ins. Co., 131 U. S. 258 (33 L. Ed. 128).

There is no pretense however that the Federal Court for the district of Arizona has by any rule adopted the procedure or practice of the state of Arizona in respect to security for costs.

In the case of Roy vs. Louisville N. O. & T. Ry. Co., 34 Fed. 276, Judge Hammond of the District Court for the Western District of Tennessee quoting the syllabus states the law on this subject in the following language:

“INFANTS—The right to sue in forma pauperis. Neither the paupers oath of an infant plaintiff nor that of the next friend can entitle them to sue without security for costs.”

The Court also holds in this case that the Tennessee Statute on the subject of costs and security

therefore is not binding on the Federal Court. This case is cited with approval on page 192 in case of *in re Collier*, 93 Fed. 191 and in the case of *Brinkley vs. L. & N. Ry. Co.*, 95 Fed. 345 on page 353.

For a very clear and exhaustive statement of the law on this subject we respectfully call the attention of the Court to the written opinion of the learned Judge in the court below, which will be found in 213 Fed. 504. On the grounds stated and supported by the uniform current of decisions in the Federal Courts, we respectfully and earnestly urge that the order and judgment of the Court below requiring plaintiff to enter into a bond securing costs in this case and the order of the Court dismissing this cause for failure of plaintiff to comply with same should be affirmed.

Respectfully submitted,

W. C. McFARLAND,

Attorney for Defendant in Error,

Clifton, Arizona.

No. 2466

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

Filed

SEP 2 - 1914

F. D. Monckton,
Clerk,

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

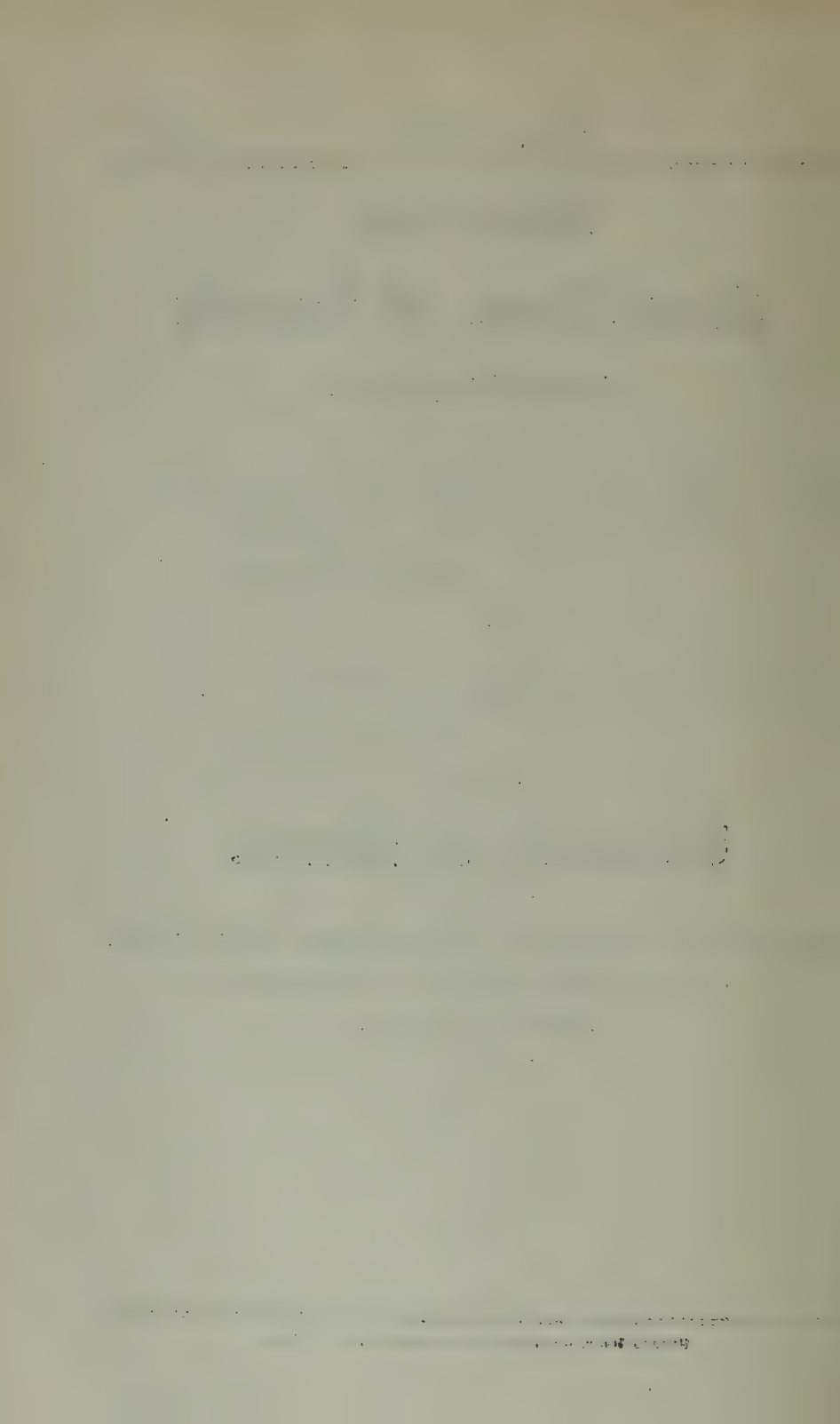
vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Plaintiff in Error:

PAUL BURKS, Esq., and E. W. CAMP, Esq.,
409 Kerckhoff Building, Los Angeles, California.

For Defendants in Error:

ALBERT SCHOONOVER, Esq., U. S. Attorney, Los Angeles, California;

HARRY R. ARCHBALD, Esq., Assistant U. S. Attorney, Los Angeles, California; and

MONROE C. LIST, Esq., Special Assistant to the U. S. Attorney, c/o Interstate Commerce Commission, Washington, D. C.

[3*]

In the District Court of the United States of America, Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

Defendant.

*Page number appearing at foot of page of original certified Record.

Writ of Error [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Hon.
OLIN WELLBORN, Judge of the United
States District Court for the Southern District
of California, Southern Division, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court before you, between The
Atchison, Topeka and Santa Fe Railway Company,
plaintiff in error, and the United States of America,
defendant in error, a manifest error hath happened,
to the damage of The Atchison, Topeka and Santa Fe
Railway Company, plaintiff in error, as by said com-
plaint appears, and we being willing that error, if any
hath been, should be corrected, and full and speedy
justice be done to the parties aforesaid in this behalf,
do command you if judgment be therein given, that
under your seal you send the record and proceedings
aforesaid, with all things concerning the same, to the
United States Circuit Court of Appeals for the Ninth
Circuit, together with this writ, so that you have the
same at San Francisco, in the State of California,
where [4] said court is sitting, within thirty days
from the date hereof, in the said Circuit Court of Ap-
peals, to be then and there held, and the record and
proceedings aforesaid being inspected, the said
United States Circuit Court of Appeals may cause
further to be done therein to correct the error what of
right and according to the laws and customs of the
United States should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 24th day of July, 1914.

[Seal] WM. M. VAN DYKE,
Clerk of the United States District Court for the
Southern District of California, Southern Division.

By Chas. N. Williams,
Deputy Clerk.

Allowed this 24th day of July, 1914.

OLIN WELLBORN,
United States Judge. [5]

I hereby certify that a copy of the within Writ was on the 24th day of July, 1914, lodged in the Clerk's Office of the said United States District Court for the Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,
Clerk United States District Court, Southern District of California.

By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: No. 244—Civil. Original. Dept. —. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The Atchison, Topeka and Santa Fe Railway Co., Defendant. Writ of Error. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

4 *The Atchison, Topeka & Santa Fe Ry. Co.*

Received copy of the within Writ of Error this
24th day of July, 1914.

ALBERT SCHOONOVER,
Attorney for Plaintiff. [6]

*In the District Court of the United States of Amer-
ica, Southern District of California, Southern
Division.*

No. 244—CIVIL.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,
Defendant.

Citation [on Writ of Error (Original)].

United States of America, to the United States of
America, Defendant in Error, Greeting:

You are hereby cited and admonished to be and
appear in the United States Circuit Court of Appeals
for the Ninth Circuit, at the city of San Francisco,
State of California, thirty days from and after the
day this citation bears date, pursuant to Writ of
Error filed in the clerk's office of the United States
District Court for the Southern District of Califor-
nia, Southern Division, sitting at Los Angeles,
wherein The Atchison, Topeka and Santa Fe Rail-
way Company is plaintiff in error, and you are de-
fendant in error, to show cause, if any there be, why
the judgment rendered against the said plaintiff in
error as in said Writ of Error mentioned should not

be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Hon. OLIN WELLBORN, Judge of the United States District Court, this 24th day of July, 1914.

OLIN WELLBORN,
U. S. District Judge. [7]

[Endorsed]: No. 244—Civil. Original. Dept. —. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The Atchison, Topeka and Santa Fe Railway Co., Defendant. Citation. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [8]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 244—CIVIL.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAIL-
WAY COMPANY, a Corporation,
Defendant. [9]

[Complaint.]

*In the District Court of the United States for the
Southern District of California, ——— Division.*

1819.

No. ———.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY,
Defendant.

Now comes the United States of America, by Aloysius I. McCormick, United States Attorney for the Southern District of California, and brings this action on behalf of the United States against the Atchison, Topeka & Santa Fe Railway Company, a corporation organized and doing business under the laws of the State of Kansas, and having an office and place of business at Los Angeles, in the State of California; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

[10]

FOR A FIRST CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 10:40 o'clock, P. M., on October 2, 1912, upon its line of railroad at and between the stations of Parker in the State of Arizona and Los Angeles in the State of California within the jurisdiction of this court, required and permitted its certain conductor and employee, to wit: C. D. Plank to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 10:40 o'clock, P. M. on said date, to the hour of 8:25 o'clock, P. M. on October 3, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 17 drawn by its own locomotive engine No. 1276, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[11]

FOR A SECOND CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

8 *The Atchison, Topeka & Santa Fe Ry. Co.*

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 10:40 o'clock P. M. on October 2, 1912, upon its line of railroad at and between the stations of Parker, in the State of Arizona and Los Angeles in the State of California within the jurisdiction of this court, required and permitted its certain brakeman and employee, to wit: C. L. Elmendorf to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 10:40 o'clock P. M. on said date, to the hour of 8:25 o'clock, P. M. on October 3, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 17 drawn by its own locomotive engine No. 1276, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[12]

FOR A THIRD CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 10:40 o'clock P. M. on October 2, 1912, upon its line of railroad at and between the stations of Parker in the State of Arizona, and Los Angeles in the State of California within the jurisdiction of this court, required and permitted its certain brakeman and employee, to wit: W. F. Rossow, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit: from said hour of 10:40 o'clock, P. M., on said date, to the hour of 8:25 o'clock P. M. on October 3, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 17 drawn by its own locomotive engine No. 1276, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[13]

WHEREFORE, plaintiff prays judgment against said defendant in the sum of fifteen hundred dollars

10 *The Atchison, Topeka & Santa Fe Ry. Co.*
and its costs herein expended.

A. I. McCORMICK,
United States Attorney.
HARRY R. ARCHBALD,
Asst. U. S. Atty.

[Endorsed]: No. 244—Civil. In the District Court of the United States for the Sou. Dist. of California, Southern Division. United States of America, Plaintiff, vs. Atchison, Topeka & Santa Fe Railway Company, Defendant. Complaint. Filed Mar. 7, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [14]

*In the District Court of the United States for the
Southern District of California, Southern Division.*

No. 244—CIVIL.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY,
Defendant.

Answer.

Now comes The Atchison, Topeka and Santa Fe Railway Company, defendant in the above-entitled cause, and in answer to the complaint of the plaintiff in said action respectfully shows:

I.

That it is and was at the times mentioned in said

complaint a common carrier engaged in interstate commerce substantially as alleged in said complaint; that on or about the times mentioned in said complaint it retained in service the certain employees named in said complaint in excess of 16 hours, substantially as stated in said complaint.

II.

And for further answer and defence to said complaint this defendant shows:

That said station of Parker is a terminal of this defendant and the terminal from which said employees [15] were engaged by this defendant to operate and accompany said train to the City of Los Angeles, in the State of California, which is the terminal to which said employees were destined at the time stated in the complaint; that the schedule and usual time of said train in going from said Parker to said Los Angeles is and was at the times mentioned in said complaint much less than 16 hours, to wit, 11 hours and 5 minutes, and that said train would, at the time mentioned in said complaint, have made said run in about 11 hours and 5 minutes, and in much less than 16 hours, but for certain casualties and unavoidable accidents, and for certain causes which could not have been foreseen by and were not known to said defendant, or any of its officers or agents at the time when said crew left said terminal at Parker; that is to say, said train was delayed at certain stations between Cadiz and Barstow by reason of congestion of trains due to certain washouts caused by storm waters shortly before the passage of said train, which washouts had delayed a number

12 *The Atchison, Topeka & Santa Fe Ry. Co.*

of passenger trains on the main line of this defendant, congesting all traffic on said line and causing necessary delay to all trains; but that said delays, aggregating 2 hours and 30 minutes before reaching the station of Barstow would not have caused said crew to exceed the time of 16 hours in reaching said station of Los Angeles.

Said train left Barstow at 7:45 A. M. October 3, and shortly thereafter, at 8:30 A. M., an axle broke under the tank of the engine of said train, whereby said train was delayed 6 hours and 10 minutes, although every [16] effort was made to remedy the accident and proceed at the earliest possible moment; that the breaking of the axle was a casualty and unavoidable accident, and was the result of causes which were not known to this defendant, or any of its officers or agents, when said engine left its terminal, to wit, said station of Barstow, and that said casualty could not have been foreseen when said engine left said Barstow.

WHEREFORE, defendant prays that said action may be dismissed, and that it may have judgment for its costs.

Dated March 29, 1913.

E. W. CAMP,
U. T. CLOTFELTER,
Attorneys for Defendant.

State of California,
County of Los Angeles,—ss.

J. L. Hibbard, being by me first duly sworn, says that he is an officer, namely, the Acting General Manager of the defendant named in the foregoing

Answer; that he has read said Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and that as to those matters he believes it to be true.

[Seal]

J. L. HIBBARD.

Subscribed and sworn to before me this 29th day of March, A. D. 1913.

J. L. B. HAMILTON,

Notary Public in and for the County of Los Angeles,
State of California. [17]

[Endorsed]: No. 244—Civil. Dept. ——. In the U. S. District Court, Southern Dist. of California, Southern Division. United States, Plaintiff, vs. A. T. & S. F. Ry. Co., Defendant. Answer. Filed Mar. 31, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received Copy of the within Answer this 31st day of March, 1913. A. I. McCormick, U. S. Atty., by Harry R. Archbald, Asst. U. S. Atty., Attorney for ————. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, Paul Burks, 409 Kerekhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [18]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

No. 244—CIVIL.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAIL-
WAY COMPANY,

Defendant.

Judgment.

This cause having come on regularly on Wednesday, the 17th day of June, 1914, being a day in the January Term, A. D. 1914, of the District Court of the United States for the Southern District of California, Southern Division, to be tried before the Court and a jury to be impanelled; Harry R. Archbald, Esq., Assistant U. S. Attorney, and Monroe C. List, Esq., Special Assistant to the U. S. Attorney General, appearing as counsel for the United States; Paul Burks, Esq., appearing as counsel for the defendant; and a stipulation as to facts having been filed in open court, and it appearing that said stipulation contains an express waiver of the right to trial by jury herein; and said cause having thereupon come on to be tried by the Court, sitting without a jury; and said cause having been argued, on behalf of the Government, by Monroe C. List, Esq., Special Assistant to the U. S. Attorney Gen-

eral, of counsel for the United States, and on behalf of defendant by Paul Burks, Esq., of counsel for defendant, and on behalf of the Government in reply by Monroe C. List, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States; and said cause having been submitted to the Court for its consideration and decision; and on the 20th day of June, 1914, Findings of Fact and Conclusions [19] of Law having been filed by the Court herein, and the Court having ordered that, in accordance with said Findings of Fact and Conclusions of Law, judgment be entered in favor of the plaintiff and against the defendant on each of the three causes of action set forth in the complaint herein, together with costs of plaintiff incurred herein; and that a penalty of \$100.00 be assessed on each of said causes of action;

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that The United States of America, plaintiff herein, have and recover of and from The Atchison, Topeka & Santa Fe Railway Company, defendant herein, Three Hundred Dollars (\$300.00), together with plaintiff's costs herein, taxed at \$36.50.

Judgment entered, June 22, 1914.

WM. M. VAN DYKE,
Clerk.

By Leslie S. Colyer,
Deputy Clerk. [20]

*In the District Court of the United States of
America, Southern District of California,
Southern Division.*

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

Defendant.

Bill of Exceptions.

The above-entitled cause came on regularly for trial, on June 17, 1914, before the Honorable OLIN WELLBORN, Judge of the above-entitled court, sitting without a jury, a jury trial having been expressly waived by the parties hereto; Messrs. Albert Schoonover, Harry R. Archbald and Monroe C. List appeared as counsel for plaintiff, and Paul Burks, Esq., appeared as counsel for defendant; and the following proceedings were then had:

The following stipulation as to facts was then read in evidence:

“In the District Court of the United States of America, Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a Corporation,

Defendant.

Stipulation as to Facts.

The parties hereto, by their respective attorneys, for the purpose of facilitating the trial of the above-entitled cause, hereby agree that upon such trial the following facts are stipulated and admitted to be true and that no proof thereof need to be introduced, but that the same shall [21] be accepted upon such trial as agreed facts the same as though written documentary evidence or oral testimony with respect thereto had been duly and regularly introduced upon such trial by witnesses duly sworn and examined; and the calling and swearing of witnesses and the introduction of documentary evidence to prove the facts hereinafter stated is hereby expressly waived.

I.

That The Atchison, Topeka and Santa Fe Railway Company, defendant, is a corporation duly organized and existing under the laws of the State of Kansas, and is and was at the times mentioned in

plaintiff's complaint a common carrier engaged in interstate commerce by rail in the State of California, and having an office and place of business at Los Angeles, California.

II.

That at the times mentioned in the complaint herein the defendant was the owner of and was operating what is known as the Santa Fe Railway System, one of the main lines of which extended from Chicago, in the State of Illinois, to Los Angeles and San Francisco, in the State of California, and in connection with which said defendant operated numerous branches extending from a connection with said main line to various points, one of which said branch lines, known as the Arizona and California branch, extended from Cadiz, California (a point 100 miles east of Barstow), to Parker, Arizona, and thence to Phoenix, Arizona.

III.

That certain of the lines of said Railway System west of Albuquerque, New Mexico, were operated as a Grand Operating Division of said system, constituting what is known as The Atchison, Topeka and Santa Fe Railway Company—Coast [22] Lines, whereas the lines of said system situated south of Ash Fork, Arizona, and east of Parker, Arizona, were operated as a separate and distinct Grand Operating Division, and were known as The Atchison, Topeka and Santa Fe Railway Company—S. F. P. & P. Lines.

IV.

That at the times mentioned in said complaint, and

for some time previous thereto, there was being operated between Los Angeles, California, on said Coast Lines, and Phoenix, Arizona, on said S. F. P. & P. Lines, a certain interstate passenger train known and designated as "Phoenix Express"—the train running from Los Angeles to Phoenix being known as train No. 18 and the train operated from Phoenix to Los Angeles being known as train No. 17, both of which said trains customarily and at the time in question were engaged in transporting United States mail, in a railway mail car which constitutes a part of the regular equipment of said train, interstate express, and interstate passengers and their baggage.

V.

That said train No. 17 customarily and upon the dates in question, and at the times mentioned in plaintiff's complaint, moved from Phoenix, Arizona, to Parker, Arizona, in charge of a certain train and engine crew in the employ of said S. F. P. & P. Lines, and that customarily, and at the times mentioned in said complaint, the train and engine crews in charge of said train were changed at Parker, Arizona, at which point there was attached to said train an engine in charge of an engine crew which customarily, and at the times mentioned in said complaint, ran from Parker, Arizona, to Barstow, California, a distance of 183.5 miles. That customarily, and at the times mentioned in said complaint, the [23] said train No. 17 was at Parker taken in charge of and handled from Parker, Arizona, to Los Angeles, California, a distance of 335.3 miles, by what is known as a "passenger train crew," consisting of

one conductor and two brakemen.

VI.

That at the times mentioned in said complaint, said passenger train crew consisted of conductor C. D. Plank and brakemen C. L. Elmendorf and W. F. Rossow, all three of whom were employees of the Santa Fe Coast Lines of said defendant, mentioned in said complaint.

VII.

That on October 2d and 3d, 1912, said passenger train No. 17, being the train mentioned in the several causes of action in plaintiff's complaint set forth, was operated between Parker, Arizona, and Los Angeles, California, by the employees in said complaint and hereinbefore described, and that said employees were required and permitted to be and remain on duty in connection with the movement of said train from 10:40 o'clock P. M., on October 2d, until 8:25 o'clock P. M., on October 3d, 1912, under the circumstances hereinafter set forth.

VIII.

That the employees mentioned in said complaint were under the rules of the defendant required to, on October 2, 1912, and did, report for duty at Parker, Arizona, at 10:40 o'clock P. M., and at 11:10 o'clock P. M. on October 2, 1912, departed from Parker, Arizona, in charge of said train, which was moved from Parker to Los Angeles as shown by the table hereunto attached, marked Exhibit "A," hereby referred to and made a part hereof, which said Exhibit "A" shows the schedule running time of said train No. 17, the actual running time [24]

on the days in question, the distances between the principal stations through which said train passed, the distance of each of said stations from Parker, and the hours said employees had been on duty at the time of their departure from each of said stations, at all of which there were sidetracks of capacity sufficient to accommodate said train No. 17, and all of which stations were continuously operated as night and day telegraph offices, and were continuously in touch with the office of the chief train dispatcher who was in charge of and was directing the movement of said train No. 17.

IX.

That in connection with the operation on said Coast Lines of the defendant all trains moving there-over between Barstow, California, and Seligman, Arizona, a distance of 318 miles, and between Cadiz, California, and Parker, Arizona, are moved pursuant to the directions of a chief dispatcher upon what is known as the "Arizona Division" with offices at Needles, California, and that all west-bound trains upon reaching Barstow, California, come under the supervision of and are operated by the chief dispatcher of what is known as the "Los Angeles Division" with offices at San Bernardino, California. That the orders and directions of the chief dispatcher of said Los Angeles Division are communicated to trains by certain train dispatchers operating under the direction of said chief dispatcher by whom orders with respect to the movement of trains between Barstow and Los Angeles are communicated by means of telephone or telegraph through the opera-

tors at the various stations to the various trains moving under the direction of said chief dispatcher.
[25]

X.

That the terminals for the passenger train crews engaged in the movement and operation of said trains Nos. 17 and 17 are Los Angeles, California, and Parker, Arizona; that the employees described in said complaint, resided and had their homes in Los Angeles, California, from which point they customarily, and immediately previous to the times mentioned in said complaint, left for Parker, Arizona, in charge of train No. 18, which arrived in Parker at or about 1:15 A. M. on October 2, whereupon said passenger train crew was released from duty until 10:40 o'clock P. M. on October 2, during which time they were not performing any service nor held responsible for the performance of any service should the occasion therefor arise, but during which time they were permitted to enjoy the accommodations for rest and *good with* which they had provided themselves at Parker, which was their "away-from-home-terminal." That customarily, and at or about the times mentioned in said complaint, the passenger train crew in charge of said train No. 17 would reach Los Angeles at or about 10:15 A. M., from which time until 10:30 o'clock P. M. on the following day they were not performing any service nor held responsible for the performance of any service should the occasion therefor arise, but during which times they were permitted to repair to and remain at their respective homes at Los Angeles,

which was their "home" terminal.

XI.

That said train No. 17 mentioned in said complaint, which left Parker, Arizona, at 11:10 P. M. on October 2, 1912, arrived at Barstow, California, at 7:10 o'clock A. M. on October 3d, they having been delayed between Cadiz and Barstow for a period of 2 hours and 30 minutes on account of washouts, [26] the causes of which said delays to said train between Cadiz and Barstow were not known to the defendant, or to any of its officers or agents in charge of said employees, at the time said employees left Parker, and which could not have been foreseen.

XII.

That said train No. 17 mentioned in said complaint was scheduled to leave Barstow at 4:45 o'clock A. M. on October 3, but that by reason of the delay to said train in reaching Barstow it actually left Barstow at 7:45 o'clock A. M. with ample time then remaining to reach Los Angeles within less than 16 hours from the time when said conductor and brakemen entered upon their service, but that at 8:30 o'clock and while said train was being operated between Barstow and San Bernardino, namely, between Bryman and Oro Grande, California, an axle broke under the tank of the engine by which said train was being moved between Barstow and San Bernardino, California, whereby the movement of said train was necessarily and unavoidably delayed for a period of 6 hours 10 minutes, with the result that said train instead of reaching San Bernardino at 7:35 A. M., according to its usual schedule, or at 10:35 A. M., as

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it would have done but for the delays in reaching and leaving Barstow, actually arrived at San Bernardino at 5:30 P. M., and that instead of reaching Los Angeles at 10:15 A. M., in accordance with its usual schedule, or at 1:16 P. M., as it would have done but for the delays in reaching and leaving Barstow had there been no further delay, actually reached Los Angeles at 8:25 P. M. on October 3d, said employees having then been on duty for 21 hours 45 minutes, but that the breaking of the axle whereby said train was delayed for a period of 6 hours 10 minutes between Bryman and Oro Grande was a casualty and an unavoidable accident and [27] that the delay to said train caused thereby was the result of causes which were not known to defendant, or to any of its officers or agents in charge of said employees at the time said employees left said terminal of Parker, and which could not have been foreseen.

XIII.

That the said train No. 17 after having been delayed in reaching and leaving Barstow, as hereinbefore described, and after having been delayed for a period of 6 hours 10 minutes by said broken axle, as hereinbefore described, proceeded to the city of Los Angeles in charge of the employees in whose charge said train had left Parker, and that in going to Los Angeles said train and said employees passed through the station of San Bernardino, California, which is a point known and designated as a division terminal and which was a place appointed and

customarily used as a terminal from and to which crews of certain other passenger and freight trains of the defendant brought their trains, but which was not a terminal for the passenger train crews in charge of said trains Nos. 17 and 18 or of any other of defendant's trains operating between said station of Parker and said station of Los Angeles, and at and previous to the time the said employees in charge of said train No. 17 had been continuously on duty for a period of 16 hours, defendant had in its employ at Los Angeles and also San Bernardino passenger train crews which were customarily assigned to other passenger trains and crews which were subject to call which were customarily used in operating freight trains who were qualified should necessity require to operate passenger trains between San Bernardino and Los Angeles. That the employees in charge of said train No. 17 could have been relieved at San Bernardino and said train placed in charge of one of [28] such other freight or passenger train crews at a time which would have permitted the employees in charge of said train No. 17 to deadhead from San Bernardino to Los Angeles, California, on said train No. 17, without performing any service and without being held responsible for the performance of any service in connection with the movement of said train No. 17 should the occasion therefor arise. That the effect of the breaking of the axle upon the tank of the engine which was hauling said train No. 17 was to block the defendant's main line between said stations of Bryman and Oro Grande, which rendered it necessary to send from San Ber-

nardino to the point where said axle broke and where said line was blocked a "wrecking crew," which said crew in addition to the other equipment which it required to open said main line for traffic had with it what is known as a portable telephone, by means of which communication was established between San Bernardino and the point where said line was blocked.

XIV.

That before the delay of 6 hours 10 minutes which resulted from said broken axle had expired, and before the damage which had caused such delay had been repaired, and before the said train left the point where such damage occurred, it was known to the defendant and to its officers and agents in charge of said employees mentioned in said complaint that such employees would have been on duty in excess of 16 hours by the time said employees reached San Bernardino, but that no effort was made to relieve said employees before they had been continuously on duty in excess of 16 hours, either previous to or at the time of their arrival at San Bernardino, or at any time before said employees reached Los Angeles.

[29]

XV.

That it is commonly understood and accepted by railroad men throughout the United States having knowledge of the practical operation of trains that the word "terminal" has reference to certain train or trains or certain crew or crews, and means the beginning or the end of the employee's run or the point at which in the regular course of business he

would go on duty as a member of a particular crew, or at which in the regular course of business he would cease to be a member of such crew of a particular train and be relieved from duty. In other words, the point at which he becomes a member of a train crew in charge of a particular train and the point to which it was intended at the time when he became a member of such crew of such train that he should accompany such train as a member of such crew; and that it is not generally understood among railroad men that the word "terminal" as applied to any particular train or the crew thereof refers to relay or division point between the point at which an employee became a member of the crew and the point to which it was intended that he should accompany the train as such member, although such intermediate relay or division point may have been the point of departure, the end of the run, or the terminal for other crews and other trains.

XVI.

That the failure of this defendant to make any effort to relieve the said employees before they had been continuously on duty for a period in excess of 16 hours or at any time before said employees reached Los Angeles was due to the understanding and belief of the officers and agents in charge of such employees that the delay to said train by reason of said casualties and unavoidable accidents justified [30] the retention in service of said employees until they should have taken said train through to the home terminal of said employees at Los Angeles,

California, and to the belief that the retention in service of said employees in excess of 16 hours was the result of a casualty and unavoidable accident, and that the delay to said train and any excess service on the part of such employees which may have resulted from said delay to said train was the result of causes not known to defendant, or to any of its officers or agents in charge of such employees at the time said employees left their away-from-home terminal at Parker, and which would not have been foreseen.

XVII.

That the railway of defendant is customarily and at the times mentioned in the complaint was a well-managed railway, operated in accordance with the best known custom and usage prevailing among well-operated railways throughout the United States, and that said defendant considered it desirable and in accordance with custom and usage prevailing upon defendant's and other well-operated railroads, from the point of view both of said railway and of its employees in question, that they should be permitted at the earliest opportunity to reach their home terminal at Los Angeles where they might rest at their respective homes before being again required to go on duty.

XVIII.

That under date of March 16, 1908, the Interstate Commerce Commission made and promulgated an administrative ruling construing the hours of service act (34 St. L. 1415) in words and figures as follows:
[31]

(i) Sec. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against those which involved no neglect or lack or precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point. (See Rule 88) "Casualty," like its synonyms "accident" and "misfortune," may proceed or result from negligence or other cause known or unknown. (Words and Phrases Judicially Defined, vo. 1, 1003.)

Act of God. Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight, and pains, and care reasonable to have been expected. (Bouvier's Law Dictionary, vol. 1, 79.)

That under date of May 5, 1908, the Interstate Commerce Commission made and promulgated an administrative ruling construing the hours of service act (34 St. L. 1415) in words and figures as follows:

74. HOURS-OF-SERVICE LAW.—Employees deadheading on passenger trains or on freight trains and not required to perform, and not held responsible for the performance of any service or duty in connection with the movement of the train upon which they are deadheading, are not while so deadheading "on duty" as that phrase is used in the act regulating the hours of labor. (See Rule 287-b.)

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That under date of May 25, 1908, the Interstate Commerce Commission made and promulgated an administrative ruling construing the hours of service act (34 St. L. 1415), in words and figures as follows:

(b) Section 3 of the law provides that: "The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where *the delay* was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip. (See Rule 287.)

XIX.

That in its annual report to Congress dated December 24, 1908, the Interstate Commerce Commission, in referring to the hours of service law, said:

[32]

THE HOURS OF SERVICE LAW.

"The federal hours of service act was approved March 4, 1907, to become effective one year from the date of its enactment. . . .

The law became effective on the 4th of March, 1908. . . .

Questions immediately arose as to its proper interpretation. With a view to explaining, in so far as possible, those features of the act which might be claimed to be ambiguous, the Commission issued the following administrative rulings:

Section 1.

The law is applicable to every common carrier subject to the act to regulate commerce and to every employee concerned in the physical operation of such company's trains.

Section 2.

The requirement for ten consecutive hours off duty applies only to such employees as have been on duty for sixteen consecutive hours.

The requirement for eight consecutive hours off duty applies only to employees who have not been on duty sixteen hours, but have been on duty sixteen hours in the aggregate of a twenty-four hour period.

A telegraph or telephone operator who is employed in a night and day office may not be required to perform duty in any capacity or of any kind beyond nine hours of total service in any twenty-four hour period.

A twenty-four hour period begins when the employee goes on duty after an interim of not less than eight consecutive hours off duty.

Time 'on duty' includes the entire period of service or responsibility therefor.

A 'week' means a calendar week, beginning with Sunday.

Section 3.

The exemptions prescribed by this section contemplate only such accidents as could not by the exercise of diligence on the part of the carriers, their agents, or officers, have been anticipated and prevented.

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Employees performing excess service are not liable to the penalties provided by the act.

Employees unavoidable delayed by reason of causes that could not, at the commencement of a trip have been foreseen, may lawfully continue on duty to the terminal or end of that run.

. . . . It is understood and so maintained by the Commission, that Congress in using this expression intended to confer for the enforcement of the hours of service law each and every power heretofore granted to the Commission; that inasmuch as the act to regulate commerce empowers the Commission, in the administration of that law, to require reports under oath, a similar authority may lawfully be exercised by the Commission in the execution of the hours of service law.

Another criticism in regard to the act under consideration has reference to section 3 thereof, that—

The provisions of this act shall not apply in any case of casualty or unavoidable accident, or the act of God. [33]

Presuming upon these exceptions, carriers have endeavored to explain their failures to comply with the law by a variety of reasons which, in the opinion of the Commission are not emergencies such as were contemplated by Congress in the drafting of the statute. Among these excuses may be mentioned 'leaky valves,' 'hot boxes,' 'drawheads pulled out'; 'engine failures'

from various causes not explained, 'broken air hose,' etc., some of which have resulted in detaining men on duty for continuous periods of more than forty-one hours.

It is respectfully suggested that the law in this particular should, so far as possible, be made specific, so as to restrict the exercise on the part of carriers of discretion in determining whether or not a given incident is a 'casualty' or 'unavoidable accident' within the meaning of the act; or that some one should be designated and empowered to decide all such questions.

While the commission is practically convinced that the act in its present form confers upon it all the power necessary to effect the objects for which it was adopted, still its terms are susceptible of more than *on* interpretation. Hence controversies must necessarily arise and while such questions can, of course, after the usual period of litigation be judicially determined, their settlement by such means will entail a large expense upon the Government, as well as considerable delay in attaining the full measure of benefit which the law should reasonably afford. It is therefore desirable that Congress should, by a few lines of explanation, so clarify the situation as authoritatively to settle most of the questions that may arise."

XX.

That the above-entitled cause may be and it is hereby submitted to the Court for decision, a jury trial of the above-entitled cause being hereby ex-

pressly waived by both parties, upon the foregoing agreed statement of facts, subject to the right of either party to have any decision rendered by the above court upon such agreed statement of facts reviewed by the Circuit Court of Appeals or by the Supreme Court of the United States as fully and to the same extent as though said cause had been tried to a jury.

Dated at Los Angeles, California, June 17th, 1914.

ALBERT SCHOONOVER,

United States Attorney,

HARRY R. ARCHBALD,

Asst. United States Attorney,

MONROE C. LIST,

Special Assistant to U. S. Attorney,

Attorneys for Plaintiff. [34]

E. W. CAMP,

U. T. CLOTFELTER,

PAUL BURKS,

Attorneys for Defendant. [35]

Exhibit "A."

Showing schedule running time and actual running time of train No. 17
on October 2d, 3d, 1912; distance between principal stations
through which said train passed between Parker and
Los Angeles; distance of each of said stations
from Parker and time employees in charge
of said train had been on duty at
the time of their departure
from said stations.

Stations.	Distance from Parker	Schedule Time.	Actual Running Time.	Time on Duty.
Lv. Parker		11:10 pm.	11:10 pm.	30"
84.6				
Ar. Cadiz	84.6	1:35 am.	1:35 am.	2' 55"
Lv. Cadiz	84.6	1:40 am.	1:40 am.	3' 00"
98.9				
Ar. Barstow	183.5	4:40 am.	7:10 am.	8' 30"
Lv. Barstow		4:45 am.	7:45 am.	9' 05"
11.8				
Cottonwood	195.3	5:05 am.	8:06 am.	9' 26"
14.2				
Bryman	209.5	5:28 am.	8:17 am.	9' 37"
5.4				
Oro Grande	214.9	5:28 am.	3:23 pm.	16' 43"
5.3				
Victorville	220.2	5:50 am.	3:36 pm.	16' 56"
8.4				
Hesperia	228.6	6:10 am.	3:56 pm.	17' 16"
10.8				
Summit	239.4	6:43 am.	4:21 pm.	17' 41"
15.0				
Devore	254.4	7:15 am.	5:10 pm.	18' 30"
10.2				
Ar. San Ber-				
nardino	264.6	7:35 am.	5:30 pm.	18' 50"
Lv. " "		8:00 am.	5:56 pm.	19' 16"
9.9				
Riverside	274.5	8:20 am.	6:30 pm.	19' 50"
60.8				
Ar. Los Angeles	335.3	10:15 am.	8:25 pm.	21' 45"

Note:—The figures shown between stations indicate the miles between such stations. [36]

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There was no further or additional testimony introduced at the trial.

The cause was then argued and submitted to the Court, and judgment ordered for plaintiff, to which order defendant duly excepted.

Thereafter the Court made and filed Findings of Fact and Conclusions of Law in words and figures as follows:

“In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

Defendant.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial on the 17th day of June, 1914, was tried before the Court without a jury, a trial by jury having been expressly waived by a stipulation in writing, signed by the attorneys for both parties hereto and filed with the Clerk of this court, said parties having agreed and stipulated as to the facts upon which said trial are admitted to be true, and as to which no proof thereof need to be introduced, and the Court finds as facts all the matters set out in paragraphs I, II, III, *IC*, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII and XIX of said stipulation as

to facts, filed herein, which said paragraphs are expressly referred to and made a part of these findings of fact.

As conclusions of law, from the foregoing findings [37] the Court finds that the act of the defendant railroad company in requiring and permitting said C. D. Plank, conductor, and C. L. Elmendorf and W. F. Rossow, brakemen, to continue on said run to the City of Los Angeles, in the State of California, was a violation of the provisions of the Hours of Service Act, approved March 4, 1907, and that plaintiff is entitled to a judgment against said defendant by reason thereof, on each cause of action set forth in said complaint, together with costs of plaintiff incurred herein; that a penalty of \$100.00 be, and it is, hereby assessed on each of said causes of action.

It is ordered that judgment be entered in accordance herewith.

Done in open court this 20th day of June, 1914.

OLIN WELLBORN,
District Judge."

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled action that the foregoing Bill of Exceptions contains all the evidence offered and received at the trial of the said cause, and all proceedings at the trial thereof, and full, true and correct copies of the agreed statement of facts upon which said cause was submitted for decision, and the findings of fact and conclusions of law, together with the substance of the

orders made by the Court; and the said Bill of Exceptions may be settled, allowed and filed.

MONROE C. LIST,
HARRY R. ARCHBALD,
ALBERT SCHOONOVER,
Attorneys for Plaintiff.

E. W. CAMP,
U. T. CLOTFELTER,
PAUL BURKS,
Attorneys for Defendant. [38]

Pursuant to the foregoing stipulation, this Bill of Exceptions is hereby approved, allowed, and the same is ordered filed.

Dated July 17th, 1914.

OLIN WELLBORN,
District Judge.

[Endorsed]: No. 244—Civil. Original. Dept. ——. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The Atchison, Topeka and Santa Fe Railway Co., Defendant. Bill of Exceptions. Filed Jul. 17, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, A. H. Van Cott, U. T. Clotfelter, M. W. Reed, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for ————. [39]

*“In the District Court of the United States of
America, Southern District of California,
Southern Division.*

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

Defendant.

Assignment of Errors.

Comes now The Atchison, Topeka and Santa Fe Railway Company, defendant in the above-entitled cause, and files the following Assignment of Errors upon which it will rely in its prosecution of a Writ of Error in the above-entitled cause, petition for which said writ of error to review the judgment of this Honorable Court made and entered in said cause on the 22d day of June, 1914, it files at the same time with this Assignment.

ASSIGNMENT I.

That the United States District Court for the Southern District of California, Southern Division, erred in denying defendant's motion for a judgment in its favor and against the plaintiff, made by it at the time when this cause was submitted to said Court for its decision upon the pleadings and upon the agreed statement of facts filed in the above cause, for the reason that it affirmatively appears from said agreed statement of facts that the retention in service during the period mentioned in plaintiff's com-

plaint of the employees therein mentioned was not in violation of the Act of Congress entitled "An Act [40] to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907, (34 St. L. 1415) because,—

(a) The delay to which were subjected the train and the employees in charge of the train mentioned in said complaint was the result of a cause not known to defendant or any officer or agent in charge of such employees at the time when said employees left a terminal and which could not have been foreseen; and

(b) That the retention in service during the time mentioned in said complaint of each of the employees therein named was the result of a casualty and of an unavoidable accident, by reason whereof the said Act of Congress did not apply to the retention in service of such employees in excess of sixteen hours, under the circumstances as set forth in said agreed statement of facts; and

(c) That the retention in service of said employees under the circumstances shown by said agreed statement of facts in excess of sixteen hours was expressly authorized by said Act of Congress and that said Act of Congress did not prohibit—but, on the contrary, expressly authorized—such service, under the circumstances as shown by said agreed statement of facts.

ASSIGNMENT II.

That said Court erred in finding that the act of the defendant in requiring and permitting conductor

C. D. Plank and brakemen C. L. Elmendorf and W. F. Rossow to continue on their run to the city of Los Angeles, in the State of California, was a violation of the provisions of the hours of service act (approved March 4, 1907; 34 St. L. 1415), for the [41] reason (1) that the train of which said conductor and brakemen were in charge had, after starting on its run, been delayed by reason of a casualty and an unavoidable accident, and (2) that the delay to which said train and said employees were subjected was the result of a cause not known to defendant, or to any of its officers or agents in charge of such employees, at the time such employees left a terminal and which could not have been foreseen.

ASSIGNMENT III.

That the Court erred in finding that plaintiff was entitled to a judgment against the defendant on each cause of action set forth in plaintiff's complaint, together with costs of plaintiff incurred in said action, and in assessing a penalty of \$100.00 against the defendant on each of said causes of action, for the reason that, as fully appears from the agreed statement of facts upon which said cause was submitted to the Court for its decision, the service of said employees, as alleged in said complaint, was not in violation of the Act of Congress entitled, "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (34 St. L. 1415), and that said Act did not prohibit—but, on the contrary, expressly authorized—said service, un-

der the circumstances shown by such agreed statement of facts.

ASSIGNMENT IV.

That the judgment made, rendered and entered in the above cause is contrary to the evidence contained in the agreed statement of facts upon which said cause was submitted to the Court for decision in this, that it affirmatively [42] appears from said agreed statement of facts that the retention in service of the employees therein and in plaintiff's complaint mentioned, during the time therein and in said complaint mentioned, was not in violation of the Act of Congress known as the hours of service act, and such Act of Congress did not apply to or prohibit—but, on the contrary, expressly authorized—such service of such employees, under circumstances as shown and set forth in said agreed statement of facts.

ASSIGNMENT V.

That the judgment made, rendered and entered in the above cause is contrary to law, because:

(a) The delay to which the train mentioned in plaintiff's complaint and the employees mentioned in said complaint who were in charge of said train were subjected was the result of a cause not known to defendant or any officer or agent in charge of such employees at the time when said employees left a terminal and which could not have been foreseen; and

(b) That the retention in service during the time mentioned in said complaint of each of the employees therein mentioned was the result of a casualty and of an unavoidable accident, by reason whereof the

said Act of Congress did not apply to the retention in service of said employees in excess of sixteen hours, under the circumstances as shown by said agreed statement of facts; and

(c) That under and by virtue of the terms of the proviso in sec. 3 of the said Act of Congress entitled "An Act to promote the safety of employees and travelers upon [43] railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (34 St. L. 1415), set forth and contained, the retention in service during the time in said complaint mentioned of the employees therein named and for such period in excess of sixteen hours as would enable said employees to complete their run to Los Angeles, under the circumstances which are shown by said agreed statement of facts to have caused such service, was expressly authorized, and the said Act of Congress did not apply to and did not prohibit the said service of said employees.

And upon the foregoing Assignment of Errors and upon the record in said cause, the defendant prays that said judgment may be reversed.

E. W. CAMP,
PAUL BURKS,

Attorneys for Defendant.

[Endorsed]: No. 244—Civil. Original. Dept. ——. District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The Atchison, Topeka and Santa Fe Railway Co., Defendant. Assignment of Errors. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the

44 *The Atchison, Topeka & Santa Fe Ry. Co.*

within assignment of errors this 24th day of July, 1914. Albert Schoonover, Attorney for Plaintiff. E. W. Camp, Paul Burks, Attorneys for Defendant. [44]

In the District Court of the United States of America, Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

Defendant.

Petition for Writ of Error and Supersedeas.

The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant in the above-entitled cause, feeling itself aggrieved by the judgment of the Court entered on June 22d, 1914, comes now by Paul Burks, its attorney, and files herewith an Assignment of Errors, and petitions said Court for an order allowing said defendant to procure a Writ of Error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until

the termination of said Writ of Error by the said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray, etc.

Dated July 18, 1914.

E. W. CAMP,
PAUL BURKS,

Attorneys for Defendant. [45]

[Endorsed]: No. 244—Civil. Original. Dept. ——. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The Atchison, Topeka and Santa Fe Railway Co., Defendant. Petition for Writ of Error and Supersedeas. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within petition this 24th day of July, 1914. Albert Schoonover, Attorney for plaintiff. E. W. Camp, Paul Burks, 409 Kerekhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [46]

In the District Court of the United States of America, Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILROAD COMPANY,

Defendant,

Order Allowing Writ of Error.

Upon motion of E. W. Camp and Paul Burks, attorneys for defendant, and upon filing a petition for a writ of error and an assignment of errors,—

IT IS ORDERED that a writ of error be and the same hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the verdict and judgment heretofore entered herein.

Dated July 24th, 1914.

OLIN WELLBORN,
District Judge.

[Endorsed]: Original. No. 244—Civil. Dept.—. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The At. & S. F. Ry. Co., Defendant. Order Allowing Writ of Error. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [47]

In the District Court of the United States of America, Southern District of California, Southern Division.

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

Defendant.

Order Staying Proceedings.

The defendant, The Atchison, Topeka and Santa Fe Railway Company, having on the 17th day of July, 1914, filed its petition for a writ of error from the verdict and judgment made and entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of the security which the defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals, and said petition having been duly allowed, now, therefore,

IT IS ORDERED that upon said defendant filing with the clerk of this court a good and sufficient bond in the sum of Five Hundred Dollars (\$500.00), to the effect that if the said defendant and plaintiff in error shall prosecute the said writ of error with effect and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and [48] virtue, the said bond to be approved by this Court, that all further proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals.

Dated July 24th, 1914.

OLIN WELLBORN,
District Judge.

[Endorsed]: Original. No. 244—Civil. Dept.—. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. the At. & S. F. Ry. Co., Defendant. Order Staying Proceedings. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [49]

*In the District Court of the United States of
America, Southern District of California,
Southern Division.*

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, The Atchison, Topeka and Santa Fe Rail-
way Company, a corporation, as principal, and Na-
tional Surety Company, as surety, are held and
firmly bound unto United States of America, the
plaintiff above named, in the sum of Five Hundred
Dollars (\$500.00), to be paid to said United States
of America, to which payment, well and truly to be
made, we bind ourselves, jointly and severally, and

our and each of our successors and assigns, firmly by these presents.

Sealed with our seals, and dated, this 18th day of July, A. D. 1914.

WHEREAS, the above-named defendant, The Atchison, Topeka and Santa Fe Railway Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States of America, Southern District of California, Southern Division, rendered and entered in said cause on the 22d day of June, 1914.

NOW, THEREFORE, the condition of this obligation is such that if the above-named, The Atchison, Topeka and [50] Santa Fe Railway Company shall prosecute said writ to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY COMPANY,

[Seal]

By A. G. WELLS,
Its General Manager.

Attest: G. HOLTERHOFF, Jr.,
Western Asst. Secretary.

NATIONAL SURETY COMPANY,

[Seal]

By CHAS. SEYLER, Sr.,
Its Resident Vice-president.

H. EVERETT CHARLTON,
Resident Assistant Secretary. [51]

AFFIDAVIT, ACKNOWLEDGMENT, AND
JUSTIFICATION BY GUARANTEE OR
SURETY COMPANY.

State of California,
County of Los Angeles,—ss.

On this 21st day of July, one thousand nine hundred and fourteen, before me personally came Chas. Seyler, Sr., known to me to be the Resident Vice-president of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of Atchison, Topeka & Santa Fe Railway Co. as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the city of Los Angeles, State of California; that he is the Resident Vice-president of said Company and knows the corporate seal thereof; that the said National Surety Company is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of Atchison, Topeka & Santa Fe Railway Co. is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Resident Vice-president of said Company, and that he is acquainted with H. Everett Charlton and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said H. Everett Charlton subscribed to said Bond is in the genuine handwriting of said H. Everett Charlton, and was thereto sub-

scribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of one thousand (\$1000) dollars.

That Frank L. Gilbert is our agent to acknowledge service in the Judicial District wherein this bond is given.

CHAS. SEYLER, Sr.

(Deponent's Signature.) [52]

Sworn to, acknowledged before me, and subscribed in my presence this 21st day of July, 1914.

[Seal]

HAZEL JONES,

(Officer's signature, description and seal.)

Notary Public in and for the County of Los Angeles,
State of California.

The foregoing bond is approved as to form, amount, and sufficiency of surety.

ALBERT SCHOONOVER,

U. S. Atty.

[Endorsed]: Original. No. 244—Civil. Dept. ——. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The At. & S. F. Ry. Co., Defendant. Bond. The foregoing Bond is hereby approved. Olin Wellborn, Judge. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [53]

*In the District Court of the United States of
America, Southern District of California,
Southern Division.*

No. 244—CIVIL.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

Defendant.

Praeceptum [for Transcript of Record].

To the Clerk of the Above Court:

Sir: Please issue a certified copy of the record in the above-entitled cause, consisting of the papers following:

1. Complaint.

2. Answer.

3. Judgment.

4. Bill of Exceptions (in which there is included the Stipulation as to Facts upon which said cause was submitted, and the Findings of Fact and Conclusions of Law).

5. Petition for Writ of Error. .

6. Assignment of Errors.

7. Writ of Error.

8. Order Allowing Writ of Error.

9. Citation in Error.

Said record to be certified under the hand of the Clerk and the seal of the above Court.

PAUL BURKS,

Attorney for Defendant. [54]

Receipt of a copy of the foregoing praecipe (in which there is set forth all papers necessary to a determination by the Circuit Court of Appeals of the Writ of Error prosecuted by the defendant) is hereby admitted this — day of July, 1914.

MONROE C. LIST,
HARRY R. ARCHBALD,
ALBERT SCHOONOVER,

Attorneys for Plaintiff.

[Endorsed]: No. 244—Civil. Original. In the District Court of the United States, Sou. Dist. of Cal., Sou. Divn. United States of America, Plaintiff, vs. The At. and S. F. Railway Company, Defendant. Praecipe. Filed Jul. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. E. W. Camp, Paul Burks, 409 Kerckhoff Building, Los Angeles, Cal., Telephone Main 2980, Attorneys for Defendant. [55]

54 *The Atchison, Topeka & Santa Fe Ry. Co.*

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. 244—CIVIL.

THE UNITED STATES OF AMERICA,
Plaintiffs,
vs.

THE ATCHISON, TOPEKA & SANTA FE RAIL-
WAY COMPANY, A Corporation,
Defendant.

I, WM. M. VAN DYKE, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing fifty-five (55) typewritten pages, numbered from 1 to 55, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Complaint, Answer, Judgment, Bill of Exceptions, Assignment of Errors, Petition for Writ of Error, Order Allowing Writ of Error, Order Staying Proceedings, Bond on Writ of Error and Praecipe for Transcript in the above and therein-entitled cause, and that the same together constitute the record in said cause as specified in the said Praecipe filed in my office on behalf of the plaintiff in error by its attorney of record.

I do further certify that the cost of the foregoing record is \$25.85, the amount whereof has been paid me by The Atchison, Topeka & Santa Fe Railway Company, the plaintiff [56] in error in said cause

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 17th day of August, in the year of our Lord one thousand nine hundred and fourteen, and of our Independence the one hundred and thirty-ninth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America in and for the Southern District of California. [57]

[Endorsed]: No. 2466. United States Circuit Court of Appeals for the Ninth Circuit. The Atchison, Topeka & Santa Fe Railway Company, a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Received and filed August 21, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2466

**In the United States Circuit Court of
Appeals, Ninth Circuit.**

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
A CORPORATION, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN
ERROR.

**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF CALIFORNIA.**

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

ALBERT SCHOONOVER,
United States Attorney.

HARRY R. ARCHBALD,
Assistant United States Attorney.

MONROE C. LIST,
Special Assistant to United States Attorney.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1914

Filed

SEP 10 1914

P. D. Woodburn

In the United States Circuit Court of Appeals, Ninth Circuit.

ATCHISON, TOPEKA & SANTA FE RAILWAY Company, a corporation, plaintiff in error,	}	No. —.
<i>v.</i>		
THE UNITED STATES OF AMERICA, DE- fendant in error.		

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

QUESTIONS INVOLVED.

1. Does a delay to a train by reason of some unavoidable accident automatically extend to the carrier a license to permit its employees thereon to continue the operation of such train to the end of their usual or customary run?
2. Where a carrier fails to relieve an employee after he has been in continuous service 16 hours, can such failure be justified by merely showing that somewhere on its run the train in question was delayed by one of the causes set forth in the proviso of section 3 of the hours-of-service act?

3. Where a train is delayed by some unavoidable accident or the like, and by reason thereof the carrier is unable to relieve the employees thereon the very instant their 16-hour period of service expires, does such excusable failure to prevent some excess service on the part of its employees on such train thereby justify the carrier in abandoning, or license it to abandon, all efforts thereafter to provide relief for such employees?
4. Do the words " a terminal," as used in the proviso of section 3 of the hours-of-service act, mean:
 - (a) THE terminal from which an employee in question starts on his trip? or
 - (b) ANY terminal through which such employee may pass while en route to the end of his usual or customary run?

I, II, III.

The mere delay to a train on account of some unavoidable accident will not license the carrier thereafter to disregard or ignore the mandatory provisions of section 2 of the hours-of-service act.

"The delay," as used in the proviso of section 3 of the hours-of-service act, does not refer to a delay that some particular train may have suffered, but has reference to the delay of the carrier in complying with the mandatory provisions of section 2 of the act.

Where it is apparent to a carrier that, by reason of an accident clearly unavoidable, it is unable to relieve an employee before he has been in service over 16 consecutive hours, the duty, nevertheless, still devolves

upon the carrier thereafter to provide relief at the earliest opportunity and thereby reduce to a minimum such employee's excess service.

As all the above questions are closely related, they will be considered under one general discussion of the limitations placed upon the mandatory provisions of section 2 of the act by the proviso of section 3.

Section 2 of the act provides:

*That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty. * * **

The italicized portion indicates that provision of the act the construction of which is involved in this case.

The only limitation placed upon these mandatory provisions of section 2 is to be found in the proviso of section 3, upon which the carrier relies as an excuse or justification for its failure to re-

lieve certain employees after 16 hours' continuous service.

This proviso reads as follows:

That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.

Reading together the mandatory provision of section 2 and this proviso, it is evident that " whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours *he shall be relieved* " unless the failure of the carrier so to relieve him is due to one of the causes named in the proviso.

It is the contention of the carrier that whenever a train is delayed somewhere on its journey by an unavoidable accident, or the like, such unavoidable delay, regardless of its duration, thereafter relieves the carrier from the mandatory provisions of section 2. In other words, the carrier contends that the proviso should be so construed as to mean that any unavoidable delay to a train operates as a license to prolong the hours of service of the employees thereon far beyond the period prescribed by Congress. So to hold would be merely to limit the phrase, "*in any case of casualty, * * **" to its narrow *interpretation* and justify a carrier in

operating a train to its final terminal, without relieving the employees thereon, in all cases where that train encounters a delay which could not actually be foreseen when it left a terminal. This would be true even though the unforeseen delay were but half an hour, and the full service required of the employees in order to complete their run might be 18 or 20 hours.

“*The provisions of this act shall not apply in any case of casualty, * * **” should be construed to mean that a carrier will be excused for requiring excess service of its trainmen *and for its failure to relieve them after they have been on duty 16 hours* only in those cases where a casualty, or the like, actually prevents a compliance with the mandatory provisions of section 2.

It was said in *United States v. Farenholt* (206 U. S., 226): “It seems that interpretation is the reading of a statute according to its letter, while construction is the reading of a statute according to its spirit and intent;” and in *Williams v. Gaylord* (186 U. S., 157) the court said: “The very essence of construction is the extension of the meaning of a statute beyond its letter.”

To illustrate the defendant’s *interpretation* and the Government’s *construction* of the act:

A train leaves W destined for Z. At X, a few miles from W, it is delayed one hour on account of an unavoidable accident. After that, no effort is made to relieve the crew; they continue to operate their train to Z and are there released from

duty, having been in continuous service over 17 hours.

The Government contends that such unavoidable accident is not a license to the carrier to require more than 16 hours' continuous service of its trainmen; that it has but the effect of relieving the carrier from the penalty only in those instances where such accident has a direct or causal connection with the failure of the carrier to relieve the employees at the end of 16 hours.

The defendant says that because "the provisions of this act shall not apply *in any case* of * * * unavoidable accident" it is not required to make the slightest effort to prevent excess service on the part of its employees.

In urging such a construction the fact is lost sight of that one of "the provisions of this act" is the requirement that an employee *shall be relieved after* 16 hours' continuous service.

This emasculative construction can be no better illustrated than by the following:

A train is en route from W to Z, which ordinarily consumes about 14 hours. No unavoidable accidents are encountered, but on account of a large amount of traffic to handle it does not reach X, a station midway between W and Z, until the crew has been on duty 10 hours. It is known for some time that they can not reach Z and be relieved within 16 hours, and in order to comply with the requirements of the act, arrangements are made to relieve the crew at Y, where it is calculated the

train will arrive approximately within 16 hours from the time it left W. But after leaving X the train is delayed for one hour by some casualty or unavoidable accident, and the provisions theretofore made to relieve the crew are abandoned, for, as the carrier contends, it is under no legal obligations to relieve the crew "*in any case of casualty or unavoidable accident.*"

In the case under consideration the train was delayed by a casualty or unavoidable accident, which, to a certain extent, jeopardized the lives of its passengers and crew; but instead of thereafter providing relief, *which could have been done*, the carrier requires the same crew, already enfeebled by excess service, to continue the operation of their train to Los Angeles, *and thus continue to jeopardize the lives of the passengers and crew.*

The contention of the carrier amounts to this: That under no circumstances is it required to relieve the crew of a passenger train, and for this reason: A passenger train runs on schedule; in the present case about 14 hours between Las Vegas and Los Angeles. In case the unforeseen does not happen the train will maintain its schedule; therefore, there will be *no necessity* of providing a relief crew; but in case the train is delayed by the unforeseen, there is *no legal obligation* to relieve the crew.

Looking at it in another way, the contention of the carrier is, that because it could not prevent the unavoidable delay to a passenger train it was

not required to prevent excess service of its crew. *In other words, because it could not prevent the passengers and crew being endangered once, it was not required to remove the cause of future hazard.*

This law was passed to meet a condition of danger incidental to the working of railroad employees so excessively as to impair their strength and alertness. It is highly remedial, and the public, no less than the employees themselves, is vitally interested in its enforcement. For this reason, although penal in the aspect of a penalty provided for its violation, the law should be liberally construed in order that its *purposes* may be effected. (*United States v. Kansas City Southern Railway Company*, 8th C. C. A.; 202 Fed. Rep., 828, and cases cited.)

This liberality of construction applies to that section of the act defining or creating the offense, but is of no avail to the carrier in its attempt to bring itself within the proviso. As was said by Mr. Justice Story in *United States v. Dickson* (15 Pet., 141, 165; 16 L. Ed., 689) :

The general rule of law which has ordinarily prevailed and become consecrated, almost, as a maxim in the interpretation of statutes, is that where the enacting clause is general in its language and objects and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its meaning. In short, a proviso carves special exceptions only out of the en-

acting clause, and those who set up any such exception must establish it as being within the words as well as within the reason thereof.

The defendant offered no evidence to show the least casual connection between the casualty or unavoidable accident and its failure to relieve the crew after 16 hours' service. In fact the evidence conclusively shows a case of wanton neglect in permitting the passenger crew to operate their train all the way to Los Angeles.

A carrier should not be excused for wholly disregarding the mandatory provisions of the act with respect to a certain train crew, even though they may have been delayed by an accident clearly unavoidable. There may be times when a carrier, by reason of some accident, is prevented from relieving a crew before they have been on duty *over* 16 hours, but we do not believe that the excusable failure to prevent some excess service is any justification for the failure of the carrier to prevent service many hours in excess of 16. To illustrate our meaning:

A train is en route from W to Z. When leaving Y the crew have been in continuous service 9 hours, but shortly thereafter are delayed by some unavoidable accident, the place of delay being where no relief can be immediately furnished. The crew remain on duty, assisting in removing the cause of the delay, but by the time this is done they have been in continuous service 16 hours and 30 minutes. From the scene of the accident the train

proceeds to Z, a run of approximately 7 hours. Long before the wreck was cleared the officials knew that this train could not reach Z within 16 hours, but, in spite of this knowledge, no effort is made to relieve the crew at any place along the line and they are permitted to operate their train to the end of their usual run, their period of service being approximately 24 hours.

Now, this train was delayed by an accident clearly unavoidable, preventing the carrier from relieving the crew before they had been on duty but little over 16 hours; but can such failure justify the carrier's neglect to provide relief at the earliest opportunity thereafter?

*“Whenever any such employee * * * shall have been continuously on duty for sixteen hours he shall be relieved * * **” unless the failure to relieve him is due to an unavoidable accident, or the like, and not due, as we believe, to the carrier's negligence in failing to take even ordinary precautions to provide relief, particularly when it is apparent that its trainmen, in the absence of relief, must remain in service an excessive number of hours.

It may be argued that it would be a hardship on the carrier to be required to take such precautions to provide relief and thus give to its employees and travelers that protection which we believe the law demands. This argument is a dangerous one and should not be heeded. The question of hardship is a dual one. There may be instances where the

sending out of a relief crew might possibly be a hardship on the carrier from a financial point of view; but if we consider this phase of the question we must of necessity and reason consider the question of hardship from the point of view of those employees and travelers whose lives would be jeopardized by some act of omission or commission on the part of some trainman who is both mentally and physically impaired by being in continuous service from 20 to 30 hours.

In the present case the unavoidable delay to the train did not prevent the carrier's obedience to the mandatory provisions of section 2; therefore, there was not the least causal connection between the unavoidable accident and the failure of the carrier to relieve its employees before they had been in continuous service over 16 hours.

In this connection we desire to call attention to the reasoning of the court in the case of *Newport News & Mississippi Valley Co. v. United States* (61 Fed. Rep., 488). Lurton, then circuit judge, in delivering the opinion of the court, said:

The contention of counsel for appellant is that the excuse for overconfinement specified in the act, "storm," is one of a class within what the law regards as an "act of God," against which a common carrier does not insure, and that Congress has to that class added another of a different character, described as "other accidental causes"; that the use of the disjunctive "or" after

“storm” indicates a purpose to except detentions due to causes not the act of God, and described by the term “accidental”; that this construction finds support in section 4388, which imposes the penalty only upon such carriers as “knowingly and willfully” fail to comply with the requirements.

This reasoning, while plausible, is not satisfactory. To yield to it would emasculate a statute having a most humane object in view. Congress did not mean that simply because the carrier had encountered a storm therefore he should be excused.

It must appear that the storm “prevented” obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable by reason of a storm to comply with the law, then he has been unavoidably “prevented” from obeying the law. If, notwithstanding the storm, he could, by due care, have complied with the law, then he is at fault, because “his own negligence is the last link in the chain of cause and effect, and in law the proximate cause” of the failure to comply with the law. Therefore, to avail himself of the excuse of “storm,” the carrier must show not only the fact of a storm, but that with due care he was “prevented,” as an avoidable result of the storm, from complying with the law. We can reach but one conclusion as to the meaning of Congress by the expression “other accidental causes.” * * *

An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause, the unlawful confinement and unreasonable detention but an effect of that negligence.

This last case involved violations of the 28-hour law, in which the carrier is only required to exercise ordinary care in its efforts to comply with the provisions of that act; but under the hours of service act it should not be excused for exercising only ordinary care. The carrier should be held at least to a high, if not the highest, degree of care, and only the exercise of such care in its endeavor to relieve an employee before he has been on duty over 16 hours should excuse such excess service.

The fact that a carrier exercised the required care to prevent an accident delaying a train does not relieve it from thereafter exercising some care to avoid the consequences of such unavoidable delay. But under no circumstances do we believe that an *excusable* delay to a train is a license for an *inexcusable* delay in relieving the employees thereon after 16 hours' continuous service.

This so-called "license" phase of the proviso was considered in a case against the Southern Railway Co., western district of North Carolina, decided October 30, 1913 (not yet reported). In that case it was the contention of the carrier that it was entitled to operate a train 16 hours and for so much longer as it might be delayed by one of the causes named in the proviso, and without re-

lieving the employees thereon. On this phase of the question the trial court said:

On that I rule that the occurrence of an accident or delay by the act of God or any case of casualty or unavoidable accident while the train is in course of transit from one terminal point to another does not mean that the entire act is suspended as to that train. To hold that the entire act would be suspended as to that train would be to hold that the 16 hours' limit did not apply to any train between terminals during the progress of whose transit between terminals any delay occurred from the exempting causes named in the statute. The delay might be any number of hours, from 5 to 10, and I hold that the statute does not mean that as to that train the operative period of service is extended from 16 to 21 or 26 hours, according as some delay from the exempting causes may occur whilst the train is in transit. I construe the statute to mean that the hours of service shall be extended in such cases only so far as may be necessary to permit the train to be operated to a point at which, due regard being had to all the circumstances of the particular case and the character of the train, the train crew could be relieved or be allowed to take the rest required by the statute.

Another case involving the same question is that of *United States v. Oregon-Washington Railroad & Navigation Company* (No. 5943), district of Oregon, decided June 4, 1914. The answer of the de-

defendant alleged that the train in question was delayed by certain causes coming within the proviso, "and that by reason of said delays and not otherwise the defendant required said employees to remain on duty 1 hour and 15 minutes in excess of 16 hours, and but for said delays said employees would not have remained on duty any amount of time in excess of 16 hours and would have completed the trip from La Grande to Umatilla in much less than 16 hours' continuous run." The answer also alleged that the causes of the delay were not known to the carrier or its officer or agent in charge of said employees at the time such employees left "the La Grande terminus" (the initial terminal for that crew).

To this answer the Government demurred and assigned the following grounds of demurrer:

1. It does not appear from said answer that the causes of the alleged delays between La Grande and Umatilla were not known to the defendant or its officer or agent in charge of the employee named in each cause of action of plaintiff's petition at the time he left a terminal.

2. It does not appear from said answer that the alleged delays between La Grande and Umatilla prevented defendant from relieving the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours.

3. It does not appear from said answer that the failure of defendant to relieve the

employee named in any of said causes of action before he had been continuously on duty more than sixteen hours was due to a casualty or unavoidable accident or the act of God; or that the failure to so relieve such employee was the result of a cause not known to the defendant or its officer or agent in charge of such employee at the time he left a terminal and which could not have been foreseen.

4. It does not appear from said answer that defendant made any effort whatsoever to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours.

In sustaining the Government's demurrer the following remarks of District Judge Bean are pertinent:

In this case the judgment of the court is that this answer does not state a defense. This service act prohibits the company from permitting its employees to remain in service more than sixteen consecutive hours, unless it shall be due to casualty, unavoidable accident, or the act of God, or when the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the employee left a terminal, and which could not have been foreseen.

So I take it the purpose of this statute is to prohibit a railway company from allowing or permitting its employees to remain in consecutive service more than sixteen hours unless the reason for the delay comes within the particular exceptions of the statute, and

therefore it seems to me that where a railway company's train is delayed and the sixteen hours expire, it is the duty of the company to relieve its employees if it can do so by side-tracking its train, if there is a station where it can be done, and that it cannot use the delay as a part of the time necessary to reach one of its terminals; otherwise it might continue the service for an indefinite length of time. So I take it this answer is not sufficient, and the demurrer should be sustained.

In the case of *United States v. Baltimore & Ohio Railroad Company*, No. 1710, Southern District of Ohio, decided December 17, 1913, the same question was raised. In his charge to the jury, District Judge Sater said:

The defendant's position, if I comprehend it correctly, is this: That where a delay occurs that is excusable under the law, the train crew may then go forward and complete the journey; go forward until it reaches its destination, although in so doing it may run over the 16-hour period; that the common carrier is not then required to relieve the crew, even if it may do so; that the common carrier has the right to have them complete the journey where a delay has occurred which is excusable, even though the time to complete the journey is in excess of the sixteen-hour period. Do I state your position correctly?

Mr. DURBAN. Yes, your Honor, except that we claim that the statute by its terms says that in that case the act shall not apply.

Mr. KING. And provided that the period of the excusable delay equals the period of the excess or the overtime; that is admitted in this case.

The COURT. That is the position of the defense as their interpretation of the law.

The Government takes a different view. Its view is that even though a delay excusable in law has occurred, after it is over and the train proceeds the carrier is not excused from working the men or permitting them to work beyond the 16-hour period, or further beyond the 16-hour period than is necessary to relieve them.

This is the Government's position, if I understand it rightly, viz, that men may not be held to their work or permitted to continue it after the 16-hour period a longer time than is necessary to relieve them.

If I understand its position, it is this: Suppose a crew starts on a run that will take 12 hours. It is out 2 hours. A delay occurs which is excusable in law. Suppose it is held there 9 hours; they would have 10 hours more of service if they should complete the whole trip. If they remained on duty to the end of the trip, they would put in 21 hours of work. Now, if I understand the defendant's position, it is that they would have the right to go forward and complete that trip although it might take them 21 hours. The Government's position is that the law does not mean that. The de-

fendant's position is that the law would not apply to that kind of a case. The Government's position is that it does apply and that it does not intend that the men shall work beyond the 16 hours, if they can be reasonably relieved, and, if they reach a point at which they may be thus relieved, it is then the duty of the carrier to relieve them. We have not had this question decided by the higher courts. I have concluded that the position of the Government is correct, and that what the law means is that where a delay has occurred, the crew may go forward operating the train, but that it can not be held in service without violating the law (if the 16-hour period has expired), if a suitable stopping place should be reached at which it may be relieved; and that if such a place is reached and the crew is not relieved, that then there is a violation of the law and the carrier becomes responsible; that it is a carrier's duty to provide in such emergencies at suitable places for persons to relieve men who have served the full statutory period or more on account of some delay which may have arisen.

It will be urged that these views of the several courts, including that of the trial court in the case at bar, are not in harmony with, but antagonistic to, certain administrative rulings of the Interstate Commerce Commission; but we believe that a glance at these rulings will be sufficient to convince to the contrary.

On March 16, 1908, the Commission made the following ruling:

287 (i) Sec. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point.

The " occurrences " that " could not be guarded against " by the exercise of the proper precaution on the part of the carrier include those instances where an unavoidable accident is the direct cause of an employee being on duty over 16 hours, and also where, after he has been on duty 16 hours, there is no " lack of precaution on the part of the carrier " in thereafter providing relief.

In conformity with the Commission's view, that, in order to prevent excessive hours of service, the carrier would send out a relief crew, unless prevented by some unavoidable accident or the like, in which event the crew so delayed might proceed to the end of its run, the operation of its train being in charge of the relief crew, the Commission, on May 5, 1908, made the following ruling:

74. Hours-of-service law. Employees dead-heading on passenger trains or freight trains and not required to perform, and not held responsible for the performance of, any service

or duty in connection with the movement of the train upon which they are deadheading, are not while so deadheading "on duty," as that phrase is used in the act regulating the hours of labor.

The law should not be so harshly construed as to compel a carrier at the exact minute the 16-hour period expires immediately to stop a train at whatever point it may happen to be and probably block its main line until the crew has had 10 hours' rest or until a relief crew arrives. Nor has the Commission, either in its construction or administration of the law, endeavored to place such a hardship on the carrier. But having in mind possible instances where crews can not be relieved after being delayed by reason of unavoidable accidents, regardless of the precautions thereafter taken by the carrier to provide relief, the Commission made the following administrative ruling:

May 25, 1908. Ruling 88.

(b) Section 3 of the law provides that—

"The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

Any employee *so delayed* may thereafter continue on duty to the terminal or end of that run. The proviso quoted removes the

application of the law to that trip. (See rule 287.) (*Italics ours.*)

It follows, therefore, that under these rulings an employee may be permitted to operate his train to the end of the run in those instances where he is delayed by "such occurrences as could not be guarded against" and when through "no neglect or lack of precaution on the part of the carrier" he can not be relieved.

Bearing in mind the purpose of the law, together with the fact that "every overworked man presents a distinct danger" (*M. K. & T. v. U. S.*, 231 U. S., 112), it is not an unreasonable construction of the same to hold that whenever an employee in train service has been continuously on duty for 16 hours he shall be relieved, not merely from that particular kind of service, but from any kind of work, unless the carrier's failure to relieve such employee is due to one of the causes set forth in the proviso. We do not believe it is sufficient for the carrier merely to say that a train was delayed by some unavoidable accident, without showing the length of the delay, or the connection between such delay and the failure to relieve the employee at the expiration of 16 hours.

It is respectfully submitted that any unavoidable accident is not, standing alone, a license to a carrier to disregard that provision of section 2 providing that an employee *shall be relieved* after 16 hours of continuous service.

The carrier will, of course, contend that the words "so delayed" refer, not to the delay in relieving an employee after he has been on duty 16 hours, but have reference to *any delay* his train may have encountered by reason of some unforeseen cause after leaving the initial terminal; and therefore, unforeseen delays to a train will license any *preventable* or *inexcusable* delay in relieving the employees thereon.

As the words "so delayed" have direct reference to the word "delay," as used in the proviso, which has already been fully discussed, we do not believe it necessary to discuss any further the carrier's ingenious construction of the hours of service act and the rulings of the Interstate Commerce Commission.

In support of its contention that all its acts, avoidable and inexcusable, are pardoned and condoned when committed subsequent to an unavoidable accident, reference may be made by the carrier to the case of *United States v. Atchison, Topeka & Santa Fe Railway Co.* (212 Fed. Rep., 1000). But we can not entirely reconcile this case with such contention.

In the first part of the decision in the Santa Fe case, much stress is laid upon the construction of the proviso taken in connection with the administrative rulings of the Commission. At the bottom of page 1006, we find this sentence:

In other words, the proviso takes the case out of the operation of the statute in every

instance except those in which the officers or agent in charge of the employee *knew*, or could have foreseen, the existence of the cause of the delay at the time such employee left the terminal or starting point.

In other words, if we may judge by the above, the carrier would only be liable for those deliberate and willful acts of its officers and agents; and, therefore, any unforeseen delay to a train automatically removes the employees thereon from within the provisions of the law. But if this is the correct construction of the act, why the necessity of placing reliance upon the Commission's rulings? And having placed reliance upon such rulings, why lose sight of the fact that the "instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers?"

However, later in the decision (p. 1008), we find this construction of the act somewhat modified. The train there involved was delayed by an accident which was admitted to have been unavoidable and unforeseen at the time the employees thereon left their terminal. If we apply the construction of the act as expressed on page 1006 to this train crew, their case would be taken out of the statute and they might operate their train to the end of their usual or customary run. But in this instance, such unavoidable and unforeseen delay does not remove the case from within the statute, for the rea-

son that part of the time consumed in reaching the final terminal was due to hauling a car manifestly in violation of the safety-appliance act.

We have no fault to find with this view of the court; in fact, we are heartily in accord with it. But we believe that if the negligence of the carrier in hauling a car in a manner prohibited by the safety-appliance act does not take the case out of the operation of the hours-of-service act, then negligence in another form, to wit, negligence in making no effort to relieve an employee at the end of 16 hours' service, should not remove that case from within the provisions of the act.

The criticism we have of this decision is the same we have of the carrier's contention; that "the delay," as used in the proviso, does not refer to the delay which some particular train may encounter and, therefore, excuse excess service of the employees thereon; for it must be remembered that one of the provisions of the act which does not apply in any case of causality, etc., is the provision that "whenever any such employee * * * shall have been continuously on duty for 16 hours he shall be relieved." While we have the greatest respect for the court rendering the decision in this Santa Fe case, we can neither agree with it nor with the carrier in the instant case that it is unnecessary to show any causal connection between a delay to a train on account of one of the causes enumerated in the proviso and "the delay" of the

carrier in relieving the employees "so delayed" after they have been continuously on duty 16 hours.

V.

"A terminal," as used in the proviso of section 3 of the hours-of-service act, does not mean, with reference to a certain employee, only THE terminal from which he starts on his trip; it includes both the initial terminal and ANY OTHER terminal that such employee may arrive at and leave while en route to his final terminal, or end of his usual or customary run.

In the Fifty-ninth Congress, first session, April 26, 1906, Mr. Esch introduced H. R. bill 18671, which was referred to the Committee on Interstate and Foreign Commerce. The committee reported the bill back to the House on May 31, 1906, with certain amendments.

The original proviso in section 4 read as follows:

Provided, That the provisions of this act shall not apply in any case where, by reason of unavoidable or unforeseen train accident or act of God occurring after such employee has left *a terminal*, he is prevented from reaching *his terminal* within the time specified in section one of this act.

The committee recommended certain amendments, so that the proviso would read as follows:

Provided, That the provisions of this act shall not apply in any case where, by reason of unavoidable accident or act of God not known to the carrier or its agent in charge of such employee at the time he left *a terminal*,

he is prevented from reaching *his terminal* within the time specified in section one of this act.

On May 4, 1906, at the same session of Congress, Mr. Esch introduced H. R. bill 18961, which was also referred to the Committee on Interstate and Foreign Commerce.

That bill made it unlawful to permit an employee "to remain on duty more than sixteen consecutive hours, except when by casualty occurring after such employee has started on his trip he is prevented from reaching *his terminal*."

On February 20, 1906, Mr. Bede introduced H. R. bill 25757, which made it unlawful to permit an employee to remain on duty more than 16 consecutive hours, "except when by casualty occurring after such employee has started on his trip or by unknown casualty occurring before he started on his trip he is prevented from reaching *his terminal*."

On March 15, 1906, Mr. La Follette introduced Senate bill No. 5133, which is the present hours of service act. This bill gave to the Interstate Commerce Commission full power to prescribe the hours of service of employees connected with train movements. It was referred to the Committee on Education and Labor, and reported by Mr. Dolliver, with an amendment, which fixed the hours of service instead of leaving it to the Commission, and which made it unlawful to require service of an employee beyond 16 consecutive hours, "except

when by casualty occurring after such employee has started on his trip he is prevented from reaching *his terminal*."

On June 27, 1906, this bill was taken up for consideration and Senator Gallinger proposed a certain amendment, which made the proviso read as follows:

except when by unavoidable accident, or act of God, or resulting from a cause not known to the carrier or its agent in charge of such employee at the time he left *the terminal*,

to which amendment Senator La Follette proposed to add the following:

or by known casualty occurring before he started on his trip.

Senator Foraker proposed an amendment, which if adopted would have made the proviso read as follows:

except when by casualty occurring after such employee has started on his trip he is prevented from reaching *his terminal*.

On January 8, 1907, Senator Dolliver offered an amendment to Senate bill 5133, which eliminated entirely the proviso and made the provisions of the act absolute.

On the same day Senator Gallinger proposed to add the following section to this bill:

SEC. 5. That nothing in this act shall be construed to prohibit or in any way interfere with the employment, with their con-

sent, of men whose hours of labor are affected herein, upon runs, single or turn, which, in the reasonable judgment of the officers of the respective railroads and of the men so employed, can be completed, in the ordinary course of business of the carrier, within sixteen hours.

On January 9, 1907, Senator Brandegee proposed an amendment making it unlawful for a carrier to require more than 16 consecutive hours' service of an employee, "except when on account of an emergency, which by reasonable care on the part of such carrier, its officers or agents, could not have been avoided, he is prevented from reaching *his terminal*, * * *"

On the same day Senator Scott proposed the following amendment:

This act shall not apply to cases where a continuance on duty beyond sixteen hours will enable an employee to reach *a terminal*: *Provided*, That at the expiration of sixteen hours he is within twenty miles of such terminal.

On January 10, 1907, Senator McCumber offered the following amendment to follow the word "terminal" in the proposed Gallinger amendment of June 27:

or except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal.

Senate bill 5133, as it passed the Senate on January 10, 1907, made it unlawful “to require or permit any employee engaged in or connected with the movement of any train carrying interstate or foreign freight or passengers to remain on duty more than 16 consecutive hours, *except when by casualty occurring after such employee has started on his trip, or by unknown casualty occurring before he started on his trip, and except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal.*”

After passing the Senate, this bill, on January 11, 1907, was referred to the Interstate and Foreign Commerce Committee of the House, and on February 16, 1907, was reported, with an amendment, and referred to the House Calendar. The proviso then read as follows:

Provided, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its agent in charge of such employee at the time said employee left *a terminal*, and which could not have been foreseen with the exercise of ordinary prudence. (All italics ours.)

The conference committee, in its report on March 1, 1907, agreed upon several amendments, but left

undisturbed and adopted the House amendment striking out the words, "his terminal."

At no time thereafter was the slightest effort made practically to stultify the act by permitting an employee, in cases of unavoidable accidents, to operate his train to the end of his usual or customary run, or, in other words, "his terminal."

CONCLUSION.

From the stipulation in this case it clearly appears:

That the carrier required certain employees in train service to be and remain continuously on duty more than 16 hours.

That while the carrier relied upon an unavoidable accident as a legal excuse for such service, it did not connect such accident with its failure to relieve such employees before they had been in continuous service more than 16 hours.

That the failure of the carrier to relieve its employees before they reached the end of their run at Los Angeles was due to its own negligence and not to any unavoidable accident.

That the unavoidable accident relied upon by the carrier as a legal excuse for prolonging the hours of service of its employees was known to the carrier, and its officers and agents in charge of the employees in question, before such employees left "*a terminal.*"

Wherefore, it is respectfully submitted that the judgment of the lower court should be affirmed.

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Special Assistant to United States Attorney.



United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

The Atchison, Topeka and Santa
Fe Railway Company, a corpor-
ation,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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No. 2466.

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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

At the request of the Interstate Commerce Commission [6] the United States brought this action to recover penalties for violations of the Act of Congress approved March 4, 1907 (34 Stats. at L., p. 1415), charging that plaintiff in error permitted certain employes to remain on duty for more than 16 hours while engaged in the movement of interstate trains [7].

Section 2 of this act reads as follows:

“It shall be unlawful for any common carrier, its officers or agents subject to this act, to require or permit any employe subject to this act to be or remain on duty for a longer period than 16 consecutive hours,” etc.

Section 3 enacts sanctions for the enforcement of the act, and contains the following proviso:

“That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officers or agents in charge of such employe at the time said employe left a terminal, and which could not have been foreseen.”

And this case turns entirely upon the proviso just quoted. The district attorney contends that in case of casualty, unavoidable accident, etc., the employes may proceed to the next point of their trip where a relief crew can be obtained and if on reaching such point the sixteen hours of service have expired, or if it is then evident that the term of service will have expired before the crew can bring the train to the next similar point, the carrier must then and there relieve the crew from further service. Plaintiff in error contends that in case of casualty, unavoidable accident, etc., occurring after a crew begins its run, the crew may complete that run no matter how many points they may pass where a relief crew might be put in charge.

The complaint states three causes of action, all with reference to a train which left Parker, Arizona, at 11:10 p. m., October 2, 1912, and ran to Los Angeles, California [7, 8, 9]. Plaintiff in error answered [10],

stating facts which bring it within the terms of the proviso as those terms are construed in this brief. Such facts are fully shown in the stipulation set out in the written stipulation upon which the cause was submitted, a jury having been waived [16, 17, 34].

This stipulation states that the plaintiff in error is a corporation engaged as a common carrier in interstate commerce by rail [17], operating a railway from Parker to Los Angeles, over which it ran a train carrying mail, interstate express, passengers and baggage [18, 19]; that this train starts from Phoenix, Arizona, changing engine and train crew at Parker; that the engine crew taking charge at Parker runs only to Barstow, California, but that the train crew, consisting of conductor and two brakemen, run through to Los Angeles (it will be noted that this case deals only with the conductor and brakemen); that the train crew consisted of the three employes named in the complaint [20]; that these employes were kept in service from 10:40 p. m., October 2 (30 minutes before time for leaving), to 8:25 p. m., October 3, at which time the train arrived at Los Angeles. The schedule [35], made a part of the stipulation, shows that the delay occurred between Bryman and Oro Grande, a delay of more than 6 hours, and that at all times after leaving Oro Grande at 3:23 p. m., October 3, until the arrival of the train at Los Angeles at 8:25 p. m., the employes had been on duty more than 16 hours; that between Bryman and Los Angeles the train passed several telegraph offices where operators were maintained, and were in communication with the train dispatcher charged with directing the movement of the

train [21]; that from Parker to Barstow the train was under the control of a chief dispatcher with office at Needles, and from Barstow to Los Angeles under the control of a chief dispatcher with office at San Bernardino, and that the train was moved on orders communicated by telephone and telegraph [21]; that the terminals for the conductor and brakemen on this train are Parker and Los Angeles; that the employes named in the complaint resided and had their homes in Los Angeles, from which point they customarily and immediately previous to the times mentioned in the complaint left for Parker in charge of the train which runs opposite to the train in question, which opposite train arrived at Parker about 1:15 a. m., October 2, whereupon the train crew was released until 10:40 p. m. that same night, during which time they were not required to perform any services; that Parker was their away-from-home terminal; that customarily the crew would reach Los Angeles about 10:15 a. m., and would perform no service from that time until 10:30 o'clock p. m. on the next day [22].

The train in question was delayed between Cadiz and Barstow 2 hours and 30 minutes on account of wash-outs. These delays could not have been foreseen when the train left Parker [23]. The train, if on time, would have left Barstow at 4:45 a. m., but actually left at 7:45, and with ample time to reach Los Angeles within less than 16 hours from Parker, but between said stations of Barstow and Oro Grande an axle under the tank of the engine broke, so that instead of reaching San Bernardino at 7:35 a. m., according to schedule (or at 10:35 a. m., on account of leaving Barstow late),

it actually arrived at San Bernardino at 5:30 p. m., and by the time the train reached Los Angeles the employes had been on duty 21 hours and 45 minutes, 6 hours and 10 minutes of which was due to the accident near Bryman [24].

San Bernardino is a point known and designated as a division terminal [24] and a place appointed and in customary use as a terminal from and to which crews of certain other passenger and freight trains operate their trains, but it was not a terminal for the passenger crew in charge of the train in question [25]. Plaintiff in error had in its employ at Los Angeles and also at San Bernardino passenger train crews subject to call, customarily employed in operating freight trains, but qualified to operate passenger trains between San Bernardino and Los Angeles, so that the employes in charge of the train in question could have been relieved at San Bernardino by placing the train in charge of other freight or passenger train crews, permitting the employes in question to deadhead from San Bernardino to Los Angeles, without performing any service between those points [25]; that before the train was ready to move after the accident near Bryman plaintiff in error and its officers in charge of said employes knew that the employes would have been on duty in excess of 16 hours by the time they reached San Bernardino, but no effort was made to relieve the employes before they had been on duty 16 hours, either before, or at, or after their arrival at San Bernardino [26].

That the word "terminal," as understood by railroad men throughout the United States, has reference to

trains and crews and means the beginning or the end of the employe's run, or the point at which, in the regular course of business, he would go on duty or at which, in the regular course of business, he would be relieved from duty. And it is not generally understood among railroad men that the word "terminal" relates to a relay or division point between the point at which the employe becomes a member of the crew and the point to which it was intended that he should accompany the train as part of the crew, although such intermediate relay or division point may have been the point of departure, the end of the run, or the terminal for other crews and other trains [26]. The failure of plaintiff in error to make any effort to relieve these employes before they reached Los Angeles was due to the understanding and belief of the officers and agents in charge of such employes that the delay to said train by reason of the casualties and unavoidable accidents mentioned justified the retention of said employes in service until they should have brought the train to the home terminal of the employes at Los Angeles, California [27]; that said railway is a well-managed railway, operated in accordance with the best known custom and usage prevailing among well-operated railways in the United States, and plaintiff in error considered it desirable, from the point of view both of said railway and of its employes in question, and in accordance with custom and usage prevailing upon its own and other well-operated railroads, that they should be permitted at the earliest opportunity to reach their home terminal at Los Angeles, where they might rest at their respective homes before being again required to

go on duty [28]. The 18th and 19th paragraphs of the stipulation [28 to 33] set forth certain rulings made by the Interstate Commerce Commission, to which more particular reference will be made in the argument in this brief.

The District Court made the stipulation its finding of facts, so that the only question in the case is whether or not these agreed facts support a judgment against the plaintiff in error.

SPECIFICATION OF ERRORS.

I.

The trial court erred in its conclusion of law [37] that the act of the plaintiff in error requiring and permitting said employees to continue on said run to the city of Los Angeles, California, was a violation of the provisions of the Hours of Service Act approved March 4, 1907, for the reason that the train of which said employees were in charge had, after starting on its run, been delayed by reason of a casualty and an unavoidable accident, and because the delay to which said train and said employees were subjected was the result of a cause not known to the plaintiff in error or to any of its officers or agents in charge of such employees at the time such employees left the terminal, and which could not have been foreseen [41]. See Assignment No. 2.

II.

The trial court erred in holding that defendant in error was entitled to a judgment against the plaintiff in error on each cause of action set forth in the complaint, together with costs, and in assessing a penalty

of \$100 against the plaintiff in error on each of said causes of action, for the reason that, as fully appears from the agreed statement of facts upon which said cause was submitted to the court for its decision, the service of said employes was not in violation of said Act of Congress approved March 4, 1907, but that said act expressly authorized such service under the circumstances shown by such agreed statement of facts [41]. See Assignment No. 3.

III.

That the judgment made, rendered and entered in the above cause is contrary to the evidence contained in the agreed statement of facts upon which said cause was submitted to the court for decision, in this, that it affirmatively appears from said agreed statement of facts that the retention in service of the employes therein and in plaintiff's complaint mentioned was not in violation of the Act of Congress aforesaid, but was expressly authorized by said act under the circumstances shown and set forth in said agreed statement of facts [42]. See Assignment No. 4.

IV.

That said judgment is contrary to law because the delay to which the train mentioned in the complaint was subjected was the result of a cause not known to the plaintiff in error or any officer or agent in charge of said employes at the time when said employes left a terminal, and which could not have been foreseen, and because the retention in service during the time mentioned in said complaint of each of said employes

was the result of a casualty and of an unavoidable accident, by reason whereof said Act of Congress did not apply to the retention in service of said employes in excess of 16 hours, and because under and by virtue of the terms of said Act of Congress the retention in service during the time in said complaint and in said stipulation of facts mentioned of the employes therein named, under the circumstances shown by said agreed statement of facts, was expressly authorized, and the said Act of Congress did not apply and did not prohibit the said service of said employes [42-3]. See Assignment No. 5.

ARGUMENT.

The word "terminal" must be given its accepted and common meaning.

One of the admitted facts in this case [Tr. p. 26, par. 15] is that the word "terminal" has a commonly understood and accepted meaning throughout the United States among railroad men, and that it means the beginning or end of the employe's run, the point at which in the regular course of business he would go on duty as a member of a particular crew, or at which in the regular course of business he would be relieved from such duty.

Now, when Congress passes a statute dealing with railroads, and specifically dealing with the trainmen employed by the railroad, and imposes a duty of enforcing the act upon the Commission whose business it is to deal with railroads (see secs. 2 and 3 of the act)—in such a case we confidently assert that the

word in question is to be taken in the sense which custom and usage have thus given it.

Ex parte Hall, 18 Mass. (1 Pick.) 261;

Green v. Weller, 32 Miss. 650;

Quigley v. Gorham, 5 Cal. 418.

That such is the meaning of the word "terminal" where used in the act is further illustrated by the proceedings in Congress upon the discussion of this act and of the various bills out of which the present act grew.

Judge Trieber, in writing his opinion in *United States v. Kansas City Southern*, 189 Fed. 471, evidently accepted without any question this common use of the word. He says:

"Is a delay in starting caused by reason of the fact that another train is late an excuse within the meaning of the proviso? That was a matter that was known to the carrier or its officers in charge of the employes at the time they left the terminal."

The meaning of the word "terminal" in the proviso is illustrated in a letter from representatives of railroad employes printed in the Congressional Record of the 59th Congress, Second Session (Vol. 41, part 1, p. 823). In the course of this letter the writers say:

"There are numerous things that might happen to a train that is only a few miles from its terminal and perhaps on the main line; that the train time might expire before relief could be gotten to them. Then, again, the crew might be but a few miles from their home terminal and the time expire, while in a few minutes perhaps they could reach their home terminal, where they could get their rest at their home where they should. We do not believe that you want to make

a law that will compel a crew to lay up 5 or 10 or 15 minutes from their home terminal just because the 10 hours were up, then when their rest was up run them into their home terminal and double them out again. Then the crew may have a hard run from their home terminal to their away-from-home terminal."

Senator Bacon, who was reading the letter, here explained:

"That means to the opposite terminal—from the home terminal to the opposite terminal."

He then read on:

"We therefore request you to do all in your power to so amend this bill in favor of the railroads of this country, so that unavoidable and unforeseen accidents be excepted, and in favor of the men that when an hour or two will get them to their home terminal be excepted; and, further, in favor of the men that when a few hours' rest at their away-from-home terminal will start them toward their home terminal, that the men be allowed to use their own judgment as to whether they are able to go or not."

The draft of the bill to which this letter referred made no provision like that added to section 3.

Senator Bacon said, in connection with this letter:

"All railroad men have their homes at or near their terminal, a place where their families are located, etc., where they are supposed to take their principal rest, and where lie-overs are permitted. Under the bill as it stands it is required that there should be ten hours' rest. As suggested in that communication, a railroad employe starting from his home, and making it may be a hard run to the other terminal, is very desirous to get back to his home and have his rest there; but he would be compelled under the bill to remain 10 hours at the other terminal and in that way have that much less rest at his home terminal."

At page 822, Senator Dolliver is quoted as follows:

“The bill contains a simple prohibition of that character, with an exception, namely, casualties occurring after the train has started upon its journey, sometimes requiring more than 16 hours on account of an accident to reach the terminals.”

At page 768 is a quotation from the Commercial & Financial Chronicle of December 28, 1906, as follows:

“The bill in question, S. B. 5133, was introduced by Senator LaFollette and prohibits all tours of duty exceeding 16 hours, excepting in cases of accidents occurring after their trains have left the initial point.”

Plaintiff in error stands on the construction early made by the Interstate Commerce Commission and accepted by Congress.

The act having been passed March 4, 1907, was made to take effect March 4, 1908. On March 16, 1908, the Interstate Commerce Commission issued an order explaining and interpreting the act. This ruling of March 16, 1908, was not incorporated in the regular publication of the Commission, known as its Conference Rulings Bulletin, until the issue of April 1, 1911, known as Conference Rulings Bulletin No. 5. Nevertheless it is the earliest ruling made by the Commission on this statute, and at page 93 of Conference Rulings Bulletin No. 5, in subdivision I of paragraph 287, the Commission said, with reference to section 3 and its proviso, that:

“They served to waive the application of the law to employes on trains only until such employes, so delayed, reach a terminal or relay point.”

Bulletin No. 5 then refers to Rule 88. Rule 88 was issued, with other rules, June 25, 1908, and is printed in Conference Rulings Bulletin No. 2 (see Pierce's Digest of Decisions, pp. 802-3). It will be noted that in this later ruling the Interstate Commerce Commission broadened its first holding, saying:

"Any employe so delayed may therefore continue on duty to the terminal or end of that run. *The proviso quoted removes the application of the law to that trip.*"

This ruling was carried forward under the same number in Conference Rulings Bulletin No. 3, No. 4 and No. 5.

In the first report made to the Congress of the United States by the Interstate Commerce Commission after the taking effect of this law, being its 22nd Annual Report, at page 49, the Commission says that questions immediately arose as to the proper interpretation of that act with a view to explaining insofar as possible those features of the act which might be claimed to be ambiguous the Commission issued the following administrative ruling, and then quoted to the Congress of the United States as the interpretation of this act by the executive body charged with the enforcement thereof the sentence set out at pages 30, 31, 32 and 33 of the transcript, being paragraph 19 of the stipulation of facts.

We call especial attention to the fact that in this first report to the Congress the Commission said:

"Employes unavoidably delayed by reason of causes that could not at the commencement of the trip have been foreseen may lawfully continue on duty to the terminal or end of that run."

In none of its later reports to the Congress of the United States, unless for the year 1913, which we have not examined, has the Commission suggested to Congress that any other interpretation might properly be put upon the language in question, or that the executive body charged with the enforcement of the act had in mind to apply any other construction.

It is pretty well understood that the reason why Congress allowed one year between the passage and the taking effect of this act was to permit the railways to make necessary rearrangements of their terminals, as the word is used in the act, in order that the run of the men might fit the 16-hour limit. In fact, nowhere from the inception of the act down has it ever been suggested that the word "terminal" had any other meaning in the law than the end of the appointed run.

What has been said with respect to the action of the Interstate Commerce Commission is merely an elaboration of the well reasoned opinion of Judge Sawtelle in *United States v. Atchison*, 212 Fed. 1000, which involved a case of delay to the train hereinbefore called the opposite train, running from Los Angeles to Parker. And these deliberate and reiterated statements of the Commission as to the sense in which it would enforce the act, and the acceptance by Congress in neither amending the act nor passing any statute declaratory of its meaning, amply justify the application of the rule that:

"The construction of a statute by those charged with the execution of it is always entitled to the most respectful consideration and ought not to be overruled without potent reason."

Heath v. Wallace, 138 U. S. 573, 34 L. Ed. 1063, and cases cited.

The judgment should be reversed, no matter what Congress meant by the word "terminal."

We have so far discussed this case as if it turned on the meaning of the word "terminal"; but it is doubtful if that word has any significance whatever in this case. The word "terminal," or the phrase "left a terminal," cannot be carried back to modify the first part of the sentence. The statement that "the act shall not apply in any case of casualty or unavoidable accident or act of God" stands without any modification. The phrase "left a terminal" applies only to that part of the proviso which deals with causes not known to the carrier at the time the employe left the terminal. It is manifest that a provision relating to the leaving of a terminal can have no relation to the service of telegraph operators and train dispatchers, yet this proviso applies to those operatives as well as to trainmen.

United States v. Missouri Pac. (C. C. A., 8th Circuit), 213 Fed. 169.

Also, in *Baltimore & Ohio v. Int. Com. Com.*, 221 U. S. 612, the court said, with reference to telegraph operators:

"Nor does the contention gather strength from the broad scope of the proviso in section 3, for if the latter, *in limiting the effect of the entire act*, could be said to include everything that may be

embraced within the term merchandise as used in section 2, this would be merely a duplication and would not invalidate the act."

It is manifest, therefore, that the first part of the proviso must be read just as if the proviso ended with the words "act of God," and the present case, growing out of the breaking of an axle, is manifestly a case of casualty and, indeed, is stipulated and found to have been a casualty and an unavoidable accident [Tr. p. 24, par. 12]. Therefore, the provisions of the act cannot apply to the tour of duty in question.

For the reason, therefore, that the word "terminal" was used by Congress in the sense which it had come to have among railroad men in the United States; and for the reason that the Interstate Commerce Commission, almost immediately after the taking effect of this act, construed the proviso in question in accordance with the contention of the plaintiff in error, and so reported to the Congress of the United States, and for the reason that the delay was due to a casualty and unavoidable accident, removing the case entirely from the purview of the statute, it is respectfully submitted that the judgment of the District Court ought to be reversed and the cause remanded, with directions to dismiss the complaint.

Dated September 16, 1914.

U. T. CLOTFELTER,

E. W. CAMP,

PAUL BURKS,

Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit

THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY COMPANY, a corpora-
tion,

Plaintiff in error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in error.

No. 2466.

PETITION FOR REHEARING

E. W. CAMP,
U. T. CLOTFELTER,
PAUL BURKS,

Attorneys for Petitioner.

Plaintiff in error.

Dated, March 5, 1915.

The Neuner Co., Los Angeles, Cal.

MAR 12 1915

F. O. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

THE ATCHISON, TOPEKA AND SANTA
FE RAILWAY COMPANY, a corpora-
tion,

Plaintiff in error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in error.

No. 2466.

PETITION FOR REHEARING.

Comes now The Atchison, Topeka and Santa Fe Railway Company, plaintiff in error, and respectfully moves this Honorable Court to grant a rehearing herein on the ground and for the reasons as follows, to-wit:

I.

The court erred in affirming the judgment rendered in the District Court of the United States.

II.

The court erred in not reversing said judgment.

III.

The court erred in holding that subdivision (i) of Rule No. 287 of the Interstate Commerce Commission made March 16, 1908, modifies Ruling No. 88 of the same body made June 25, 1908.

IV.

The court misinterpreted subdivision (i) of said Rule No. 287.

V.

Ruling (i) No. 287, and said Ruling No. 88 being necessarily inconsistent the court erred in not giving effect to Ruling No. 88, which was later in point of time.

VI.

The court erred in not giving effect to the ruling made by the Commission and reported to the Congress of the United States as the ruling of the Commission in the 22nd Annual Report of the Interstate Commerce Commission at pages 49 and 50, in which report, at page 50, the commission quotes the following as one of its administrative rulings:

“Employes unavoidably delayed by reason of causes that could not at the commencement of a trip have been foreseen may lawfully continue on duty to the terminal or end of that run.”

VII.

The court erred in not accepting and applying said Ruling No. 88 and the ruling quoted in the fore-

going paragraph as one of contemporaneous construction placed upon the Act by the body charged with its enforcement.

VIII.

The court erred in not holding said Ruling 88 and said ruling quoted in paragraph VI hereof a rule of property in conduct and in not sustaining it.

IX.

The court erred in substituting its own construction for that of the Interstate Commerce Commission, as set forth in said Ruling No. 88 and in said ruling quoted in paragraph VI hereof in respect to an enactment demanding construction.

X.

The court misapprehended the scope and meaning of Ruling (i) No. 287, and hence misinterpreted said ruling.

XI.

The court erred in holding that the plaintiff in error was required to relieve the train crew at San Bernardino, or at any other point short of Los Angeles, the end of the run.

XII.

The construction given by the court to the first proviso of the 3rd section of the Act is erroneous, and in any case it is in conflict with the declared construction thereof by the Interstate Commerce

Commission, as manifested in said Ruling No. 88 and in said ruling quoted in paragraph VI hereof.

XIII.

The court erred in holding that the word "terminal" affects any portion of the proviso of the 3rd section of the Act in question, except that part of the proviso which deals with causes not known to a carrier at the time when the employe left the terminal, the delays in this case being due to casualties and unavoidable accidents.

May it please your Honors, we are filing this petition for a rehearing in view of the fact that a petition for a rehearing has been filed by the San Pedro, Los Angeles & Salt Lake Railroad Company in Case No. 2412, on the authority of which case this case was decided, as stated in the opinion of your Honors. Because this case was so decided we deem it our duty to take such steps as may secure to The Atchison, Topeka and Santa Fe Railway Company the benefit of any reconsideration that may be given to Case No. 2412; and we desire to concur in and to have the benefit in this case of what is stated in the petition and argument for a rehearing submitted in said Case No. 2412.

ARGUMENT.

Under the circumstances we assume that it will not be necessary nor desirable to reproduce the argument which is made a part of the petition for rehearing in Case No. 2412, to which we could in any event add

but little. However, we desire to call again the court's attention to the fact not noticed in the opinion, and which we think has perhaps been overlooked, that the Interstate Commerce Commission not only made a ruling on the subject, in strict accordance with our contention, in June, 1908, as noted in the opinion, but on December 24, 1908, the Commission transmitted to the Senate and House of Representatives its 22nd Annual Report, and on pages 49 and 50 submitted to the body which had enacted the law under consideration the interpretation which the Commission had placed upon that law. And this interpretation placed upon the law by the body charged with the administration of the law was accepted by the Congress which enacted the law; for had the interpretation not been acceptable to the Congress that body would by resolution have declared the intent of the Act or by amendment changed it. Certainly it is difficult to conceive a more authoritative declaration of the meaning of the Act than is shown by the facts just noted.

We desire again to call the court's attention to the fact that the stipulation which is made a part of the bill of exceptions in this case and appears in the transcript, beginning at page 17, contains, in paragraph 15, at page 26, the statement that the word "terminal", as commonly understood and accepted by railroad men throughout the United States having knowledge of the practical operation of trains, means the beginning or end of the employe's run, or the

or at which, in the ordinary course of business, he would go on duty as a member of a particular crew, or at which, in the ordinary course of business, he would cease to be a member of such crew of a particular train and be relieved from duty; the point at which he becomes a member of the train crew in charge of a particular train, and the point to which it was intended at the time when he became a member of such crew of such train that he should accompany such train as a member of such crew. And that it is not generally understood among railroad men that the word "terminal", as applied to any particular train or the crew thereof, refers to any relay or division point between the point at which an employe became a member of the crew and the point to which it was intended that he should accompany the train as such member, although such intermediate relay or division point may have been the point of departure, the end of the run, or the terminal, for other cars and other trains.

We desire, also to call the court's attention again to the proposition that the meaning of the word "terminal" is not important in Case No. 2466. In the stipulation of fact, which is a part of the bill of exceptions and is printed in the transcript, beginning at page 17, it is stated, at page 24, that the breaking of the axle whereby said train was delayed for a period of six hours and ten minutes between Bryman and Oro Grande was a casualty and an unavoidable accident.

Now, the word "terminal", where used in the proviso to section 3, has no reference nor connection with the words "casualty or unavoidable accident". It has reference only to such delays as are the result of a cause not known to the carrier, or its officers or agents, at the time said employe left the terminal. That is to say, where there is a casualty, or unavoidable accident, or the act of God intervening, the provisions of the Act do not apply. It is impossible to connect the word "terminal" with the first part of the proviso; otherwise, as pointed out in our brief, it would be impossible to make any application of the proviso to the case of a telegraph operator or dispatcher.

We therefore respectfully submit that a reconsideration and rehearing of this case ought to be granted.
Dated, March 5, 1915.

E. W. CAMP,
U. T. CLOTFELTER,
PAUL BURKS,
Attorneys for Petitioner.

No. 2467

United States
Circuit Court of Appeals

For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a Corporation,
and TONOPAH & GOLDFIELD RAIL-
ROAD COMPANY, a Corporation,

Plaintiffs in Error,
vs.

GOLDFIELD CONSOLIDATED MILLING AND
TRANSPORTATION COMPANY, a Corpo-
ration,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.

Filed

SEP 3 - 1914

F. D. Monahan,
Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a Corporation,
and TONOPAH & GOLDFIELD RAIL-
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Plaintiffs in Error,

vs.

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Defendant in Error.

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Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, in and for
the Northern District of California, First Division.*

(No. 15,700.)

**GOLDFIELD CONSOLIDATED MILLING &
TRANSPORTATION COMPANY, a Cor-
poration,**

Plaintiff,

vs.

**SOUTHERN PACIFIC COMPANY, a Corporation,
and TONOPAH & GOLDFIELD RAIL-
ROAD COMPANY, a Corporation,**

Defendants.

Complaint.

Comes now the plaintiff, Goldfield Consolidated Milling & Transportation Company, and for its complaint herein alleges:

I.

That the plaintiff, Goldfield Consolidated Milling & Transportation Company, was at all of the times in this complaint stated, ever since has been and is now a corporation duly organized, created and existing under and by virtue of the laws of the State of Wyoming, with its principal office and place of business in the town of Goldfield, in the State of Nevada.

II.

That the defendant, Southern Pacific Company, was at all of the times in this complaint stated, ever since has been and is now a corporation, duly created, organized and existing under and by virtue of the laws of the State of Kentucky, maintaining a

principal operating office and place of business in the City and County of San Francisco, and State of California and as such corporation was and is a common carrier for hire.

III.

That the defendant, Tonopah & Goldfield Railroad Company, was [1*] at all of the times in this complaint stated, ever since has been and is now a corporation duly created and existing under and by virtue of the laws of the State of Nevada, with a principal office and place of business in the town of Goldfield in the State of Nevada, and as such corporation was and is a common carrier for hire.

IV.

That heretofore in the month of October, 1910, the plaintiff caused to be shipped over the lines of the defendants from Youngstown, Ohio, to Goldfield, Nevada, a carload of steel window-sash and parts, weight of 21,399 pounds, and that the freight charge for the transportation of said articles was Three and Forty-four Hundredths (\$3.44) Dollars per hundred pounds on a minimum basis of 30,000 pounds per car, and the amount of freight paid by the plaintiff to the defendant for said transportation was the sum of One Thousand and Thirty-two (\$1,032) Dollars. That at the time of the movement of the same freight, there was no joint through rate applicable to the traffic and the said charges were made up by applying a commodity rate of One and Thirty Hundredths (\$1.30) Dollars from Youngstown, Ohio, to Sacramento, California and a class rate of Two

*Page number appearing at foot of page of original certified Record.

and Fourteen Hundredths (\$2.14) Dollars from Sacramento, California, to Goldfield, Nevada. That at that time there was a published commodity rate of sixty-five (65¢) cents per hundred pounds on wooden window-sash in carloads from Sacramento, California, to Goldfield, Nevada.

V.

That on the 9th day of August, 1912, and within two (2) years from the date of said shipment and its cause of action accrued, this plaintiff as complainant instituted a certain proceeding before the Interstate Commerce Commission at Washington, D. C., and filed [2] its complaint therein, whereby the plaintiff as such complainant attacked the rate above mentioned applied upon the movement of said steel window-sash and parts as unreasonable to the extent that said charges exceeded the charge that would have accrued on said shipment upon the basis of wooden window and sash. That said petition before the Interstate Commerce Commission was docketed as No. 5064 and that said complainant in said proceeding in addition to attacking said rate as unreasonable, also asked that the said Commission order the defendants to make reparation to this plaintiff in the sum of Four hundred and forty-seven (\$447.00) Dollars, together with interest thereon, from November 25, 1910. That said defendants filed answers to said complaint before the Interstate Commerce Commission; and that issues were duly made and thereafter heard and tried and that the said Interstate Commerce Commission thereafter and upon the 8th day of April, 1913, duly decided said

issue and filed its written opinion, being No. 2281, containing its conclusions and order, a copy of which is hereunto attached and marked Exhibit "A" and made a part of this complaint.

VI.

That said report and order were thereupon forthwith duly served upon the defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company and that the said defendants and each of them have failed, neglected and refused and still fail, neglect and refuse to comply with and obey said order of said Commission and pay over to this complainant the said sum of Four Hundred and Forty-seven (\$447.00) Dollars, together with interest thereon from November 25, 1910, and that said sum of Four Hundred and Forty-seven (\$447.00) Dollars, together with interest thereon, is still due, owing and unpaid from the said defendants to this plaintiff. [3]

VII.

That the plaintiff has made demand upon the said defendants for the payment of said sum of Four Hundred and Forty-seven (\$447.00) Dollars, together with interest thereon, but said demand has been refused.

That said plaintiff is compelled to resort to this action for the collection of said sum as provided by law, and that a reasonable attorneys' fee for the bringing, prosecuting and maintaining of this action is the sum of Two Hundred and Fifty (\$250.00) Dollars.

WHEREFORE plaintiff prays judgment in favor of the plaintiff, Goldfield Consolidated Milling & Transportation Company, against the defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company for the sum of Four Hundred and Forty-seven (\$447.00) Dollars, together with interest thereon at the rate of seven (7%) per cent per annum from the 25th day of November, 1910, and for all costs of this action, and for the further and additional sum of Two Hundred and Fifty (\$250.00) Dollars as and for an attorneys' fee for the bringing, prosecuting and maintaining of this action for the attorneys of record for the plaintiff herein, and for such other and further relief as may be just and proper in the premises.

BROWN & BAER,

Attorneys for Plaintiff. [4]

State of California,

City and County of San Francisco,—ss.

Chas L. Brown, being duly sworn, on oath states:

That he is a member of the firm of Brown & Baer and as such is one of the attorneys for the plaintiff in the above-entitled action that the plaintiff Goldfield Consolidated Milling & Transportation Company is a corporation organized under the laws of the State of Wyoming, with its principal office and place of business in the State of Nevada, and that it is absent from the State of California and from the City and County of San Francisco, where this affiant has his office, and that none of the officers of said corporation are in the State of California or in the City and County of San Francisco, where this

affiant has his office, and that this affidavit and verification to the foregoing complaint is made for and on behalf of said plaintiff and that the facts set forth in said complaint are within the knowledge of this affiant, and for these reasons this verification is made by affiant, and that affiant has read the above and foregoing complaint and knows the facts therein set forth and that the same are true of his own knowledge, except as to those matters which are therein set forth upon information and belief and as to those matters, affiant believes it to be true.

CHAS. L. BROWN.

Subscribed and sworn to before me this 11th day of October, 1913.

W. B. MALING,

Clerk U. S. District Court, Northern District of California. [5]

Exhibit "A" [to Complaint].

OPINION No. 2281.

INTERSTATE COMMERCE COMMISSION.

No. 5064.

GOLDFIELD CONSOLIDATED MILLING &
TRANSPORTATION COMPANY

vs.

CHICAGO & ERIE RAILROAD COMPANY et al.

Submitted November 30, 1912—Decided April 8,
1913.

Charges for the transportation of a carload of steel window sash from Youngstown, Ohio, to Goldfield, Nev., at a combination through rate based on Sacramento, Cal., found unreasonable to the

extent that the portion of the through rate from Sacramento to Goldfield exceeded the rate contemporaneously in effect from and to the same points on wooden window-sash in carloads. Reparation awarded.

GEORGE S. MINOTT, for Complainant.

C. W. DURBROW, for Union Pacific Railroad Company and Southern Pacific Company.

HUGH K. BROWN, for Tonopah & Goldfield Railroad Company.

REPORT OF THE COMMISSION.

By the COMMISSION:

Complainant, a corporation engaged in business at Goldfield, Nev., by petition, filed August 9, 1912, alleges that it was charged an unreasonable rate for the transportation of a carload of steel articles from Youngstown, Ohio, to Goldfield, Nev., and asks reparation.

In October, 1910, complainant shipped over defendant's lines from Youngstown, Ohio, to Goldfield, Nev., a carload of steel window-sash, and parts, of the weight of 21,399 pounds, for which transportation charges were collected at a rate of \$3.44 per 100 pounds, [6] on a minimum of 30,000 pounds, amounting to \$1,032. There was no joint through rate applicable to the traffic, and the charges were made up of a commodity rate of \$1.30 from Youngstown, to Sacramento, Cal., and a class rate of \$2.14 from Sacramento to Goldfield. At the time the shipment moved there was a published commodity rate of 65 cents per 100 pounds on wooden window-sash

in carloads from Sacramento to Goldfield, which rate is still in force. Complainant contends that the charges were unreasonable to the extent that they exceeded charges that would have accrued at a through rate of \$1.95 per 100 pounds, made up of \$1.30 to Sacramento and 65 cents thence to Goldfield; or, in other words, that the rate on steel window-sash should not exceed the rate on wooden window-sash.

In transcontinental tariffs steel sash and wooden sash are carried at the same carload rates, both westbound and eastbound. Official classification names each article fifth class, in carloads, and southern classification sixth class. Western classification accords iron or steel window-sash fourth class and wooden window-sash fifth class. The former article loads heavier than the latter.

Defendants say the wide difference in the rates from Sacramento to Goldfield is due to the fact that the wooden sash rate applies to forest products generally, including blinds, door sash, mouldings, etc. Considering the two commodities from a transportation viewpoint, and the fact that both are carried at the same rates in transcontinental tariffs and in the official and southern classifications, the explanation offered is not convincing.

Upon the facts of record, we are of opinion and find that the rate from Sacramento to Goldfield, charged as part of the through rate from Youngstown to Goldfield, was unreasonable to the extent that it exceeded the rate contemporaneously in effect on wooden [7] window-sash in carloads, from and

to the same points, and a rate not to exceed the wooden sash rate will be prescribed for the future.

We further find that complainant made the shipment in accordance with the above statement of facts and paid charges thereon at the rate herein found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount paid and the amount which it would have paid at a combination through rate of \$1.95 per 100 pounds, made up of \$1.30 to Sacramento, Cal., and 65 cents beyond, and that complainant is therefore entitled to an award of reparation against the Southern Pacific Company and Tonopah & Goldfield Railroad Company in the sum of \$447, with interest from November 25, 1910. An order will be entered accordingly. [8]

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 8th day of April, A. D., 1913.

No. 5064.

THE GOLDFIELD CONSOLIDATED MILLING
& TRANSPORTATION COMPANY,

vs.

CHICAGO & ERIE RAILROAD COMPANY; ERIE
RAILROAD COMPANY; ELGIN, JOLIET
& EASTERN RAILWAY COMPANY; CHI-
CAGO & NORTH WESTERN RAILWAY

COMPANY; UNION PACIFIC RAILROAD COMPANY; SOUTHERN PACIFIC COMPANY; and TONOPAH & GOLDFIELD RAILROAD COMPANY.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

IT IS ORDERED, that defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company be, and they are hereby, notified and required to cease and desist, on or before July 1, 1913, and for a period of two years thereafter to abstain, from charging, demanding, collecting, or receiving as a part of the through rate from Youngstown, Ohio, to Goldfield, Nev., their present rate for the transportation of steel window-sash in carloads from Sacramento, Cal., to Goldfield, Nev., which rate is found in said report to be unreasonable.

IT IS FURTHER ORDERED, that said defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company be, and they are hereby, notified and required to establish, on or before July 1, 1913, upon statutory notice to the Interstate Commerce Commission [9] and the general public by filing and posting in the manner prescribed in Section 6 of the act to regulate commerce, and for a period of two years after said July 1, 1913, to main-

tain and apply to the transportation of steel window-sash in carloads from Sacramento, Cal., to Goldfield, Nev., as part of the through rate from Youngstown, Ohio, to Goldfield, Nev., a rate not in excess of the rate contemporaneously in effect on wooden window-sash in carloads from and to said points, which relation of rates is found in said report to be reasonable.

AND IT IS FURTHER ORDERED, That said defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company be, and they are hereby, authorized and directed to pay unto complainant, The Goldfield Consolidated Milling & Transportation Company, on or before July 1, 1913, the sum of \$447, with interest thereon at the rate of 6 per cent per annum from November 25, 1910, as reparation on account of a rate charged for the transportation of a carload of steel window-sash and parts from Youngstown, Ohio, to Goldfield, Nev., which rate so charged has been found to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

By the Commission,

[Seal]

GEORGE B. McGINTY,
Secretary.

[Endorsed]: Filed Oct. 11, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [10]

[**Summons.**]

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California, Second Division.

GOLDFIELD CONSOLIDATED MILLING &
TRANSPORTATION CO., a Corp.,
Plaintiff,

vs.

SOUTHERN PACIFIC CO., a Corporation, and
TONOPAH & GOLDFIELD RAILROAD
CO., a Corporation,

Defendants.

Action brought in said District Court, and the Complaint Filed in the Office of the Clerk of said District Court, in the City and County of San Francisco.

To the President of the United States of America,
Greeting: To Southern Pacific Company, a Corporation, and Tonopah & Goldfield Railroad Company, a Corporation, Defendants.

YOU ARE HEREBY DIRECTED TO APPEAR, and answer the Complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the Northern District of California, Second Division, within ten days after the service on you of this Summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will

take judgment for any money or damages demanded in the Complaint, as arising upon contract, or it will apply to the Court for any other relief demanded in the Complaint.

WITNESS the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 11th day of October, in the year of our Lord one thousand nine hundred and thirteen and of our Independence the one hundred and thirty-eighth.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk. [11]

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Summons on the therein named Southern Pacific Company (a corporation), by handing to and leaving a copy together with a bill of Complaint attached thereto with H. A. Jones, who is Asst. Treasurer of the Southern Pacific Co., a corporation, personally, at San Francisco, in said District on the 14th day of October, 1913.

C. T. ELLIOTT,
U. S. Marshal.

By Paul J. Arnerich,
Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Summons on the therein named Tonopah & Goldfield Railroad Company, a corporation, by handing to and leaving a copy together with a bill of Complaint attached thereto with John McLaren, Gen. Agent Tonopah & Goldfield Railroad Company, a corporation, personally, at San Francisco, in said District, on the 14th day of October, 1913.

C. T. ELLIOTT,

U. S. Marshal.

By Paul J. Arnerich,

Deputy.

[Endorsed]: Filed Oct. 18, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [12]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

No. —.

GOLDFIELD CONSOLIDATED MILLING and
TRANSPORTATION COMPANY, a Cor-
poration,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, and TONOPAH and GOLDFIELD
RAILROAD COMPANY, a Corporation,
Defendants.

Demurrer to Complaint.

The defendants, Southern Pacific Company and Tonopah and Goldfield Railroad Company, demur to the complaint of plaintiff in the above-entitled action and to the whole of said complaint, and as grounds for demurrer thereto they specify:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That said complaint does not state facts sufficient to constitute a cause of action against defendant, Southern Pacific Company.

3. That said complaint does not state facts sufficient to constitute a cause of action against defendant, Tonopah and Goldfield Railroad Company.

4. That said complaint does not set forth briefly or at all the causes for which plaintiff claims damages as prescribed in Section 16 of the Act to regulate commerce (24 Statutes at Large, page 379), as amended up to the date hereof.

5. That said complaint contains no allegation that [13] the plaintiff has sustained any damages or damage in consequence of its having been charged by defendants and of its having paid to them for the transportation of the shipment mentioned in the complaint the rate and the amount of freight which in paragraph IV of said complaint it is alleged to have been charged and to have paid on said shipment, or that it has sustained any damages or damage in consequence of defendants having failed to comply with the order of the Interstate Commerce Commission that they pay to plaintiff the sum of Four Hun-

dred and Forty-seven Dollars (\$447.00), with interest thereon from November 25, 1910, at six per cent per annum, as reparation on account of the rate charged by them on said shipment, as in said complaint averred; and it is not alleged in the complaint that the plaintiff has been in any way damaged or injured by or in consequence of any of the facts alleged in said complaint or appearing therein.

6. That said complaint contains no allegation that the rate charged by the defendant on the shipment mentioned therein was unreasonable and excessive or was otherwise or in any particular contrary to law.

WHEREFORE, said defendants pray the judgment of this Honorable Court whether they or either of them shall be compelled to make any further or other answer to the said complaint or to any of the matters and things therein contained, and to be hence dismissed with their and each of their costs in this behalf sustained.

HUGH H. BROWN,
HENLEY C. BOOTH,
FRANK C. CLEARY and
GEORGE D. SQUIRES.

Attorneys for Defendants. [14]

Service of the within Demurrer is admitted this 3d day of Nov., 1913.

BROWN & BAER,
Attorneys for Plaintiff.

[Endorsed]: Filed November 3d, 1913. W. B. Maling, Clerk. [15]

At a stated term, to wit, the November term, A. D. 1913, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 10th day of November, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,700.

GOLDFIELD CONSOLIDATED MILLING &
TRANSPORTATION CO.

vs.

SOUTHERN PACIFIC CO. et al.

Order Overruling Demurrer.

Defendant's demurrer came on this day to be heard, no one being present in support of demurrer and counsel for plaintiff being present in opposition thereto. After consideration thereof it was ordered that said demurrer be and the same is hereby overruled. [16]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

No. 15,700.

GOLDFIELD CONSOLIDATED MILLING &
TRANSPORTATION COMPANY, a Cor-
poration,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, and TONOPAH & GOLDFIELD RAIL-
ROAD COMPANY, a Corporation,

Defendants.

Answer.

The defendants, Southern Pacific Company, a corporation, and Tonopah & Goldfield Railroad Company, a corporation, for answer to the complaint of plaintiff on file in the above-entitled action,—

Deny that a reasonable attorneys' fee for the bringing, prosecuting or maintaining of this action by plaintiff is the sum of two hundred and fifty dollars (\$250).

As a further and separate answer and defense to the action, these defendants allege that in the proceeding which the plaintiff instituted before the Interstate Commerce Commission at Washington, D. C., on the 9th day of August, 1912, wherein it attacked as unreasonable the rates applied by defendants on the shipment mentioned in said complaint, to wit: in the proceeding referred to in

paragraph V of the complaint, no evidence was introduced or offered, and no evidence was heard by the Commission which would warrant or sustain the decision or written opinion, numbered 2281, rendered and filed by said Commission in said proceeding, and mentioned in said paragraph, or which would [17] warrant or sustain the findings or conclusions of the Commission, or any of them, contained in said decision; and these defendants allege that the decision and opinion rendered by said Commission in said proceedings and the findings and conclusions of the Commission therein contained were, and that each of them was, unsupported by and contrary to the evidence offered and introduced in said proceeding.

As a further and separate answer and defense to the action, these defendants allege that in the proceeding which the plaintiff instituted as complainant before the Interstate Commerce Commission, at Washington, D. C., on the 9th day of August, 1912, and which is more particularly mentioned in paragraph V of the complaint herein, no evidence was introduced or offered, and none was heard by the Commission, which would warrant or sustain that portion of its decision or opinion numbered 2281, rendered and filed in said proceeding, wherein the Commission found that the rate of \$2.14 per 100 pounds from Sacramento, California, to Goldfield, Nevada, charged as part of the through rate of \$3.44 per 100 pounds from Youngstown, Ohio, to Goldfield, Nevada, on the carload shipment of steel window-sash and parts, made by plaintiff in October, 1910, and mentioned in the complaint herein, was

unreasonable to the extent that it, to wit, said rate from Sacramento to Goldfield exceeded the rate contemporaneously in effect on wooden-sash in carloads from and to the same points, or which would warrant or sustain that portion of said decision or opinion wherein the Commission found that by reason of the complainant in said proceeding having been charged on said shipment the rate so found to be unreasonable, the complainant *at* been damaged to the extent of the difference between the amount so [18] paid and the amount which it would have paid had a combination through rate of \$1.95 per 100 pounds, made up of \$1.30 to Sacramento, California, and sixty-five cents beyond, and that said complainant was therefore entitled to an award of reparation against the defendants herein, the Southern Pacific Company and Tonopah & Goldfield Railroad Company, in the sum of four hundred and forty-seven dollars (\$447), with interest from November 25, 1910. These defendants allege that the above-mentioned portions of the decision and opinion of said Commission are, and that each of them is, unsupported by and contrary to the evidence offered and introduced in said proceeding, and that there was no evidence introduced or heard therein which would warrant or sustain a finding that the rate charged by the defendants in this action on the aforesaid shipment was to any extent, or at all, unreasonable, or that said complainant was on account of the charges made by defendants on said shipment entitled to reparation, or that it should be awarded reparation, in any amount whatsoever.

As a further and separate answer and defense to the action, these defendants allege that in the proceeding which the plaintiff instituted as complainant before the Interstate Commerce Commission, at Washington, D. C., on the 9th day of August, 1912, and which is more particularly mentioned in paragraph V of the complaint herein, no evidence was introduced or offered, and none was heard by the Commission, which would warrant or sustain the order of the Commission, made and entered upon its decision or report, containing its findings of fact and conclusions thereon, and filed in said proceeding as in said paragraph stated, or which would warrant or sustain any portion of such order, or which would warrant or sustain that particular portion of said order for the [19] enforcement of which the present action is brought, viz., that portion thereof wherein and whereby the defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company are ordered, authorized and directed to pay to the complainant, the Goldfield Consolidated Milling & Transportation Company, on or before July 1st, 1913, the sum of four hundred and forty-seven dollars (\$447), with interest thereon at the rate of six per cent per annum from November 25, 1910, as reparation on account of the rate charged by them on the shipment referred to in the complaint herein, and which said rate the Commission in its said Report or Decision found to be unreasonable. And these defendants allege that said order of the Commission and the particular portion thereof just referred to are, and that each of them is, unsupported

by and contrary to the evidence offered and heard in said proceeding, and not founded upon any substantial evidence taken therein; and they furthermore allege that said order and the portion of said order mentioned are, and that each of them is, based upon findings and conclusions of the Commission contained in its decision in said proceeding, which findings or conclusions, or any of them, are not supported or sustained by the evidence, but all of which are contrary to the evidence introduced in said proceeding, and for this reason they aver that the Commission had no power or jurisdiction to make the aforesaid order either wholly or in part, and that said order of the Commission and the portion of said order hereinabove referred to are, and that each of them is, contrary to law and void.

As a further and separate answer and defense to the action, these defendants allege that the rate which was assessed and charged by them on the carload shipment of steel window-sash [20] and parts which plaintiff, in the month of October, 1910, caused to be made from Youngstown, Ohio, to Goldfield, Nevada, as averred in paragraph IV of the complaint herein, was a combination rate made up of a commodity rate of \$1.30 per 100 pounds from Youngstown, Ohio, to Sacramento, California, and a class rate of \$2.14 per 100 pounds from Sacramento, California, to Goldfield, Nevada, as in said paragraph stated, and that said constructed rate of \$3.44 per 100 pounds on a minimum carload weight of 30,000 pounds was the rate legally applicable to and chargeable upon said shipment, as shown by tariffs of the

defendants on file with the Interstate Commerce Commission and in force at the time said shipment moved. They allege that there was at that time a published commodity rate of 65 cents per 100 pounds on wooden window-sash and other lumber products in carloads from Sacramento, California, to Goldfield, Nevada; but they aver that said rate last mentioned could not for a number of reasons be properly or legally applied as a factor entering into the combination rate chargeable on the above mentioned shipment. They aver that said commodity rate of 65 cents per 100 pounds between Sacramento and Goldfield is, and that it was at the time the aforesaid shipment moved, a rate applying not merely on shipments of wooden window-sash but on shipments of many similar products, such as lumber, doors, blinds, posts, flooring and the like, all grouped and embraced in the defendants' published tariffs under the general heading of "Forest Products." They aver that the transportation conditions governing the local movement of wooden window-sash and parts between Sacramento and Goldfield, whether in straight carload lots or in mixed carload lots with other forest products, are, and that they were at the time said shipment moved, entirely different from those which govern, and then governed, the movement of steel or iron [21] window-sash and parts, or other steel or iron products, between these two points, and that no relation whatever exists between the conditions obtaining in these two distinct classes of shipments. In this behalf they allege that wooden window-sash is a perishable and comparatively cheap product and

that steel or iron window-sash is a stable product and an article of much greater value than wooden sash and that it loads lighter, and in addition, that shipments of wooden window-sash are made, and at or about the time said shipment moved were made, over the lines of the defendants in large volume, but that very few shipments of steel or iron window-sash are made, or were then made, over their said lines. They further aver that the aforesaid commodity rate applying on wooden window-sash and other lumber forest products from Sacramento to Goldfield, is, and at the times in the complaint mentioned was a materially lower rate than the class rate of \$2.14 per 100 pounds applying on iron and steel window-sash and other iron and steel articles between the same points, this fact being due to the great difference in value between the two classes of shipments and the other circumstances above mentioned. Said lumber forest product rate is moreover, and at all times has been a highly competitive rate. The defendants are, and they were at the time the above shipment moved, large lumber carrying roads and they carry, and then carried, many shipments of lumber forest products into and from Tonopah and Goldfield, in the State of Nevada, and vicinity, and in so doing they have had to meet the competition of other carriers, operating from San Pedro, California, to and from said Nevada points, and which carry commodities of the same character to the same markets. This competition has been for a number of years last past very active and has forced down said rate on wooden sash and other lumber products to an [22] unreason-

ably and abnormally low figure, and such rate was voluntarily fixed by the defendants at such figure simply to enable them to meet the aforesaid competition of other carriers transporting similar lumber products to and from Tonopah and Goldfield, and vicinity.

For all the foregoing reasons these defendants allege that said commodity rate of 65 cents per 100 pounds on lumber products from Sacramento to Goldfield cannot be taken as a measure of a reasonable rate between these points on wooden window-sash or other lumber products, and much less as the measure of a reasonable rate on steel or iron window-sash, a much more valuable commodity moving in considerably less volume and under different traffic conditions, and that it is and was at the time the above shipment moved a rate wholly inapplicable to shipments of steel or iron window-sash. And they further allege that the Interstate Commerce Commission in finding and deciding in the proceeding which was instituted before it by plaintiff on the 9th day of August, 1912, and which is more particularly referred to in paragraph V of the complaint, that the rate from Sacramento to Goldfield charged as part of the through rate from Youngstown to Goldfield on the aforesaid shipment was unreasonable to the extent that it exceeded the rate contemporaneously in effect on wooden window-sash in carloads in and from the same points, and, therefore, in effect, that the rate last mentioned should be applied to said shipment, and that the complainant was hence entitled to reparation in the sum claimed by it in said

proceeding, so found and decided contrary to law and to the evidence adduced before it in such proceeding and without any substantial evidence to support its said finding or decision, or its order of reparation entered thereon. [23]

WHEREFORE, these defendants pray that plaintiff take nothing by its said action, and that defendants be hence dismissed and that they recover their costs of suit.

HUGH H. BROWN,
HENLEY C. BOOTH,
C. W. DURBROW and
GEO. D. SQUIRES,
Attorneys for Defendants.

State of California,
City and County of San Francisco,—ss.

S. N. Bostwick, being duly sworn, deposes and says: That he is an officer, to wit, Assistant General Freight Agent, of Southern Pacific Company, one of the defendants in the above-entitled action, and that as such officer he is familiar with the matters and things mentioned in the foregoing answer, and is qualified to make this affidavit for and on behalf of said corporation; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on information or belief and as to those matters that he believes it to be true.

S. N. BOSTWICK.

Subscribed and sworn to before me this 20th day of December, 1913.

[Seal]

HUGH T. SIME,

Notary Public in and for the City and County of San Francisco, State of California. [24]

Service of the within Answer is admitted this 20th day of December, 1913.

BROWN & BAER,

Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 20, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,700.

GOLDFIELD CONSOLIDATED MILLING & TRANSPORTATION COMPANY, a Corporation,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and TONOPAH & GOLDFIELD RAILROAD COMPANY, a Corporation,

Defendants.

Amendments to Answer of Defendants.

The defendants, Southern Pacific Company, a corporation, and Tonopah & Goldfield Railroad Company, a corporation, file, as of course, the following amendments to their answer heretofore filed in the above-entitled action, viz.:

1. In line 12, page 6, of said answer, between the word "above" and the word "mentioned," insert the words "and hereinafter."

2. In line 26, page 6, of said answer, strike out the word "simply," between the words "figure" and "to."

HUGH H. BROWN,
H. C. BOOTH,
C. W. DURBROW and
GEO. D. SQUIRES,
Attorneys for Defendants. [26]

State of California,
City and County of San Francisco,—ss.

S. N. Bostwick, being duly sworn, deposes and says: That he is an officer, to wit, Assistant General Freight Agent, of Southern Pacific Company, one of the defendants in the above-entitled action, and that as such officer he is familiar with the matters and things mentioned in the foregoing amendments, and is qualified to make this affidavit for and on behalf of said corporation; that he has read the foregoing amendments to defendants' answer in said action, and knows the contents thereof and that the same are true of his own knowledge.

S. N. BOSTWICK.

Subscribed and sworn to before me this 25th day of February, 1914.

[Seal]

HUGH T. SIME,
Notary Public in and for the City and County of
San Francisco, State of California.

Copy of the within amendments received this 26th day of February, 1914.

BROWN & BAER,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 26, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [27]

*In the District Court of the United States Northern
District of California, Second Division.*

#15,700.

GOLDFIELD CONSOLIDATED MILLING AND
TRANSPORTATION COMPANY,

vs.

SOUTHERN PACIFIC COMPANY et al.

Stipulation Waiving Jury.

Trial of this cause by jury is hereby waived.

Dated this Mch. 2, 1914.

BROWN & BAER,
Attys. for Plaintiff.
H. H. BROWN,
H. C. BOOTH,
C. W. DURBROW and
GEO. D. SQUIRES,
Attys. for Defendants.

[Endorsed]: Filed March 2d, 1914. Walter B.
Maling, Clerk. [28]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

No. 15,700.

GOLDFIELD CONSOLIDATED MILLING &
TRANSPORTATION COMPANY, a Corpo-
ration,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
and TONOPAH & GOLDFIELD RAILROAD
COMPANY, a Corporation,

Defendants.

Judgment.

This cause having come on regularly for trial on the 27th day of March, 1914, being a day in the March, 1914, Term of said Court, before the Court sitting without a jury, a trial by jury having been duly waived by stipulation filed; C. L. Brown, Esq., appearing as attorney for plaintiff and C. W. Durbrow, Esq., appearing as attorney for the defendants; evidence having been introduced on behalf of the plaintiff and no evidence having been offered by the defendants, and the cause having been argued and submitted to the Court and the Court being fully advised in the premises, having ordered that judgment be entered in favor of plaintiff and against said defendants in the sum of \$447.00, together with interest thereon at the rate of 6% per annum from November 25, 1910, and for costs, together with an attor-

ney's fee in the sum of \$150.00:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Goldfield Consolidated Milling & Transportation Company, a corporation, plaintiff, do have and recover of and from Southern Pacific [29] Company, a corporation, and Tonopah & Goldfield Railroad Company, a corporation, defendants, the sum of Five Hundred Thirty-six and 55/100 (\$536.55) Dollars, together with an attorney's fee in the sum of One Hundred Fifty and 00/100 (\$150.00) Dollars and together with its costs in this behalf expended, taxed at \$20.50.

Judgment entered March 27, 1914.

WALTER B. MALING,

Clerk.

A true copy.

[Seal]

Attest: WALTER B. MALING,

Clerk.

[Endorsed]: Filed March 27, 1914. W. B. Maling.
Clerk. [30]

*In the District Court of the United States, for the
Northern District of California.*

No. 15,700.

GOLDFIELD CONSOLIDATED MILLING &
TRANSPORTATION COMPANY, a Cor-
poration,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, and TONOPAH & GOLDFIELD
RAILROAD COMPANY, a Corporation,

Certificate to Judgment-roll.

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 27th day of March, 1914.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed March 27th, 1914. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[31]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 15,700.

GOLDFIELD CONSOLIDATED MILLING &
TRANSPORTATION COMPANY, a Cor-
poration,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, and TONOPAH & GOLDFIELD
RAILROAD COMPANY, a Corporation,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED that on the 27th day of March, 1914, this cause came on for trial before the Court without a jury, a trial by jury having been duly waived by the written stipulation of the parties, filed herein, Honorable Wm. C. Van Fleet presiding. The plaintiff appeared by C. L. Brown, Esq., its counsel, and the defendants by C. W. Durbrow, Esq., their counsel; whereupon the following proceedings were had:

Mr. BROWN.—This is a proceeding, if the Court please, to recover an order of reparation heretofore made by the Interstate Commerce Commission after a hearing before it, and after its order directing a change in the rate on steel window-sashes from Youngstown, Ohio, to Goldfield, Nevada. The amount of the reparation involved is \$447, with 6 per cent interest from November 25th, 1913, the carriers being the defendants in this proceeding, the Southern Pacific Company, and the Tonopah & Goldfield Railroad Company, having failed and refused to comply with the order of the Commission. There is an [32] understanding between Mr. Durbrow and myself that certain evidence may be introduced under a stipulation. The stipulation is as follows: It is agreed that the plaintiff may offer in evidence a printed copy of the decision of the Interstate Commerce Commission together with the printed order of the Interstate Commerce Commission in which they decided case No. 5064, pending before it, being the case in which the order of repara-

tion now sued for was made without the same being duly certified; and in pursuance of the stipulation I now offer in evidence the printed decision and order of the Commission. I offer it in evidence and ask that it be marked and identified as "Complainant's Exhibit No. 1." (The paper referred to is thereupon introduced in evidence and hereafter appears in full under designation of "Plaintiff's Exhibit No. 1.") I presume the Court does not care to have it read at this time.

The COURT.—No; if it is the same as attached to the pleadings, I have read the pleadings.

And under the same stipulation I offer the order of the Commission in the same case in which the order was made denying the petition for rehearing and ask that it be marked "Complainant's Exhibit No. 2."

(The paper referred to is thereupon introduced in evidence and hereafter appears in full under designation of "Plaintiff's Exhibit No. 2.")

A further agreement has been made between counsel which I will now dictate into the record. It is stipulated and agreed that upon the hearing of this case either party may use the official transcript and exhibits that was made by the official reporter upon the hearing in case No. 5054 before the Interstate Commerce Commission. [33] That is your understanding, is it, Mr. Durbrow?

The COURT.—What was that again?

Mr. BROWN.—It is stipulated that either party may use the official transcript furnished by the reporter in the hearing before the Interstate Com-

merce Commission, Case No. 5064, together with the exhibits introduced, as shown by that transcript.

Mr. DURBROW.—The stipulation is to this effect: That I am willing that if the transcript of the evidence taken before the Commission has any materiality, that it may be introduced without the certification of the Secretary of the Commission.

The COURT.—You reserve the right to object to its materiality?

Mr. DURBROW.—In any particular, yes.

Said objection was overruled by the Court, to which objection the defendants, by their counsel, then and there excepted.

Mr. BROWN.—In pursuance of the stipulation I now offer in evidence from the official transcript of the hearing of said cause, pages 3 to 8, inclusive, except the last two lines on page 8 of said transcript.

Mr. DURBROW.—What is the purpose of that?

The COURT.—You had better read it.

Mr. BROWN.—I want to complete my offer, and then I will proceed to read it; and also “Exhibit 1, 2, 3 and 4” used upon the hearing of said cause before the Interstate Commerce Commission and referred to in the pages of the transcript mentioned.

Mr. DURBROW.—If your Honor please, if any part of the transcript is to be introduced in evidence the whole of it should be introduced in evidence. I would like to ask counsel for my information, as well as for the Court, the purpose of introducing [34] this transcript, or any part of it.

Mr. BROWN.—In answer to counsel the complaint in this case—under the pleadings every para-

graph of the complaint is admitted except the one which asks for an attorney's fee of \$250. A special defense or several special defenses—

The COURT.—(Intg.) For attorney's fees here or before the Commission?

Mr. BROWN.—Here. Several special defenses are set up in the answer to this effect: That in the hearing before the Interstate Commerce Commission of this cause, there was no evidence of an unreasonableness of the rate that was in question; that is pleaded as one defense. A further defense is pleaded that there was no evidence submitted to justify the Commission in making the order of reparation of \$447, the amount sued for. A further defense is that there was no evidence offered to justify the Commission in making the decision that it made finding the rate upon this particular commodity to be an unreasonable rate, it being a combination of a class rate and a commodity rate from Youngstown, Ohio, to Sacramento, California, and a class rate from Sacramento back to Goldfield. The combination being \$3.44 per hundred lbs. on steel window-sashes, the commodity shipped. The purpose of this offer is to show at that hearing there was introduced in evidence various matters and facts bearing upon all of those questions.

Mr. DURBROW.—Mr. Brown, if you will pardon me, I have no objection to the introduction of the transcript and exhibits if its purpose is to overcome the affirmative allegation in the answer that the order was not supported by the evidence, because I understand that in cases such as this or in cases where the

carrier seeks to enjoin an order of the Interstate Commerce [35] Commission, the District Court of the United States have uniformly permitted the introduction of the transcript in evidence, it being the only way that the carriers can prove there was no evidence or there was not sufficient evidence upon which a Commission could predicate its order. It may be said that the rule has been uniformly adopted by the Commerce Court and by the Circuit Court of the United States, and the only case tried in this circuit before Judges Morrow, Ross and Gilbert. I have no objection to the introduction of the whole transcript or the entire transcript in that particular, but I will object to the introduction of any part.

The COURT.—I suppose any part may be offered. You have the right to offer the whole of it.

Mr. BROWN.—The only part I want to offer is the pages showing the affirmative proof made at that hearing. (Counsel thereupon reads from the transcript commencing on page 3 “Examiner Pugh. The Interstate Commerce Commission,” down to and including the words, “The case is with the defendants,” on page 8), which hereafter appears in full under designation of “Plaintiff’s Exhibit No. 7,” in that portion of the transcript of the testimony taken before Examiner Pugh of the Interstate Commerce Commission, commencing with the words “Examiner Pugh,” on page 3 thereof, and ending with the words “the case is with the defendants” on page 8 thereof.

I now offer the various documents referred to in the transcript, being “Exhibits 1, 2, 3 and 4,” and

ask that they be so marked in this case. (Which said documents are introduced in evidence and hereafter appear in full under designation of "Plaintiff's Exhibit No. 3," "Plaintiff's Exhibit No. 4," "Plaintiff's Exhibit No. 5" and "Plaintiff's Exhibit No. 6," respectively.) [36]

I am somewhat unfamiliar with your Honor's practice on the allowance of attorney's fees in cases of this character. The law provides that where a carrier fails to comply with the order of the Commission for reparation, that the party entitled to recover such reparation shall within one year institute suit in the United States Court in the proper circuit to recover the same, and where such suit is instituted, it is necessary that the Court on hearing the case shall allow a reasonable attorney's fee to the attorney for the complainant.

The COURT.—What do you refer to, putting in evidence as to the value of services?

Mr. BROWN.—Yes, sir. In the complaint I have alleged that a reasonable fee for the bringing and prosecuting of this suit would be \$250, and I am willing to leave the matter to your Honor's judgment.

The COURT.—In cases of this character that have arisen here I have followed the method of procedure which I followed and which is generally followed in the State courts in like matters. Parties may introduce evidence if they see fit, but if not, the Court will exert its own judgment based upon its general knowledge of the value of such services, and fix the fee out of its own breast.

Mr. BROWN.—I am perfectly satisfied with that.

The COURT.—I know the statute allows a reasonable fee. Of course, where the matter is of a simple character the Court can usually reach a solution independent of evidence, and where evidence is introduced it does not feel entirely bound by it, but uses its own judgment.

Mr. BROWN.—I am perfectly willing, to leave that feature [37] of the case to your Honor's judgment, as a man of experience, and with that I will rest the case.

The COURT.—Very well.

Mr. DURBROW.—We have no evidence to offer at all, your Honor, with the exception that I ask to have the entire transcript and exhibits which were before the Commission, introduced and considered in evidence in support of the allegations of our answer.

Mr. BROWN.—There is no objection to that.

(All of that portion of the transcript heretofore introduced in evidence and designated herein as "Plaintiff's Exhibit No. 7," together with exhibits designated herein as "Plaintiff's Exhibits 3, 4, 5 and 6," and also the remainder of the transcript of the proceedings before the Interstate Commerce Commission, commencing with the name "S. N. Bostwick," on line 3 page 23 thereof, and ending with the words "matter was closed," on line 2, page 32 thereof, including the title page thereof, was thereupon introduced in evidence as "Defendant's Exhibit No. I.")

It is certified that the exhibits introduced upon the trial of said cause are as follows:

**Plaintiff's Exhibit No. 1 [Report of Interstate
Commerce Commission].**

OPINION No. 2281.

INTERSTATE COMMERCE COMMISSION.

No. 5064.

**GOLDFIELD CONSOLIDATED MILLING &
TRANSPORTATION COMPANY,**

VS.

CHICAGO & ERIE RAILROAD COMPANY et al.

Submitted November 30, 1912. Decided April 8,
1913. **[38]**

Charges for the transportation of a carload of steel window sash from Youngstown, Ohio, to Goldfield, Nev., at a combination through rate based on Sacramento, Cal., found unreasonable to the extent that the portion of the through rate from Sacramento to Goldfield exceeded the rate contemporaneously in effect from and to the same points on wooden window sash in carloads. Reparation awarded.

GEORGE S. MINOTT, for Complainant.

C. W. DURBROW, for Union Pacific Railroad
Company and Southern Pacific Company.

HUGH H. BROWN, for Tonopah & Goldfield
Railroad Company.

REPORT OF THE COMMISSION.

By the COMMISSION:

Complainant, a corporation engaged in business at

Goldfield, Nev., by petition, filed August 9, 1912, alleges that it was charged an unreasonable rate for the transportation of a carload of steel articles from Youngstown, Ohio, to Goldfield, Nev., and asks reparation.

In October, 1910, complainant shipped over defendants' lines from Youngstown, Ohio, to Goldfield, Nev., a carload of steel window sash, and parts, of the weight of 21,399 pounds, for which transportation charges were collected at a rate of \$3.44 per 100 pounds, on a minimum of 30,000 pounds, amounting to \$1,032. There was no joint through rate applicable to the traffic, and the charges were made up of a commodity rate of \$1.30 from Youngstown, to Sacramento, Cal., and a class rate of \$2.14 from Sacramento to Goldfield. At the time the shipment moved there was a published commodity rate of 65 cents per 100 pounds on wooden window sash in carloads from Sacramento to Goldfield, which rate is still in force. Complainant contends that the charges were unreasonable [39] to the extent that they exceeded charges that would have accrued at a through rate of \$1.95 per 100 pounds, made up of \$1.30 to Sacramento and 65 cents thence to Goldfield; or, in other words, that the rate on steel window sash should not exceed the rate on wooden window sash.

In transcontinental tariffs steel sash and wooden sash are carried at the same carload rates, both westbound and eastbound. Official classification names each article fifth class, in carloads, and southern classification sixth class. Western classification accords iron or steel window sash fourth class and

wooden window sash fifth class. The former article loads heavier than the latter.

Defendants say the wide difference in the rates from Sacramento to Goldfield is due to the fact that the wooden sash rate applies to forest products generally, including blinds, door sash, moldings, etc. Considering the two commodities from a transportation viewpoint, and the fact that both are carried at the same rates in transcontinental tariffs and in the official and southern classifications, the explanation offered is not convincing.

Upon the facts of record, we are of opinion and find that the rate from Sacramento to Goldfield, charged as part of the through rate from Youngstown to Goldfield, was unreasonable to the extent that it exceeded the rate contemporaneously in effect on wooden window sash in carloads, from and to the same points, and a rate not to exceed the wooden sash rate will be prescribed for the future.

We further find that complainant made the shipment in accordance with the above statement of facts and paid charges thereon at the rate herein found to have been unreasonable; that [39½] complainant has been damaged to the extent of the difference between the amount paid and the amount which it would have paid at a combination through rate of \$1.95 per 100 pounds, made up of \$1.30 to Sacramento, Cal., and 65 cents beyond, and that complainant is therefore entitled to an award of reparation against the Southern Pacific Company and Tonopah & Goldfield Railroad Company, in the sum of \$447,

with interest from November 25, 1910. An order will be entered accordingly.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 8th day of April, A. D. 1913.

No. 5064.

THE GOLDFIELD CONSOLIDATED MILLING
& TRANSPORTATION COMPANY

vs.

CHICAGO & ERIE RAILROAD COMPANY;
ERIE RAILROAD COMPANY; ELGIN,
JOILET & EASTERN RAILWAY COM-
PANY; CHICAGO & NORTH WESTERN
RAILWAY COMPANY; UNION PA-
CIFIC RAILROAD COMPANY; SOUTH-
ERN PACIFIC COMPANY; and TONO-
PAH & GOLDFIELD RAILROAD COM-
PANY.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed, a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

IT IS ORDERED, That defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company be, and they are hereby, notified and re-

quired to cease and desist, on or before July 1, 1913, and for a period of two years thereafter to abstain, from [40] charging, demanding, collecting, or receiving as a part of the through rate from Youngstown, Ohio, to Goldfield, Nev., their present rate for the transportation of steel window sash in carloads from Sacramento, Cal., to Goldfield, Nev., which rate is found in said report to be unreasonable.

IT IS FURTHER ORDERED, That said defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company be, and they are hereby, notified and required to establish, on or before July 1, 1913, upon statutory notice to the Interstate Commerce Commission and the general public by filing and posting in the manner prescribed in section 6 of the act to regulate commerce, and for a period of two years after said July 1, 1913, to maintain and apply to the transportation of steel window sash in carloads from Sacramento, Cal., to Goldfield, Nev., as part of the through rate from Youngstown, Ohio, to Goldfield, Nev., a rate not in excess of the rate contemporaneously in effect on wooden window sash in carloads from and to said points, which relation of rates is found in said report to be reasonable.

AND IT IS FURTHER ORDERED, That said defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company be, and they are hereby, authorized and directed to pay unto complainant, The Goldfield Consolidated Milling & Transportation Company, on or before July 1, 1913, the sum of \$447, with interest thereon at the rate of 6 per cent per annum from November 25, 1910, as

reparation on account of a rate charged for the transportation of a carload of steel window sash and parts from Youngstown, Ohio, to Goldfield, Nev., which rate so charged has been found to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

By the Commission. [41]

[Seal]

GEORGE B. MCGINTY,
Secretary.

[Endorsed]: "U. S. Dist. Court, Nor. Dist. of Cal. Pltff. Exhibit 1. W. B. M., Clerk." [42]

Plaintiff's Exhibit No. 2 [Order of Interstate Commerce Commission Denying Petition for Rehearing].

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C. on the 18th day of June, A. D. 1913.

EDGAR E. CLARKE,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
JAMES S. HARLAN,
CHARLES C. McCHORD,
BALTHASAR H. MEYER,
JOHN H. MARBLE,

Commissioners.

No. 5064.

THE GOLDFIELD CONSOLIDATED MILLING
& TRANSPORTATION COMPANY

vs.

CHICAGO & ERIE RAILROAD COMPANY et al.
ORDER DENYING HEARING.

Upon further consideration of the record in the above-entitled case, and of defendants' petition for rehearing,

IT IS ORDERED, That said petition for rehearing be, and the same is hereby denied.

IT IS FURTHER ORDERED, That a copy of this order be served upon each of the parties to this case.

By the Commission,
(L. S.) GEORGE B. McGINTY,
Secretary.

[Endorsed]: "U. S. Dist. Court, Nor. Dist. of Cala., Pltff., Exhibit 2. W. B. M., Clerk." [43]

Plaintiff's Exhibit No. 3 [Docket].

Docket 5064.

Statement Billing 1 Carload Steel Window Sash and
Parts from Youngstown, O., to Goldfield, Nev.,
Oct. 25, 1910.

Car.	Article.	Min. Wt.	Rate.	Charges.	Reference Trf. Classn.
Wab. 64970	221 Steel Window Sash				T. C. Trf. ICC929.
	10 bdl's (62 Pcs.) do				Page 94 PFTB.
	1 bx. Steel do		1.30		Trf. 7, ICC14,
	S. L. C.		2.14		Page 28, 4th class.
	Actual Weight 21399 lbs.	30000	3.44	1032.00	West Classn. 48IC.
	Claimed should apply	30000	1.95	585.00	Page 98, Item 1 5/6.
			Reparation	447.00	

Claimed that \$1.95 per 100 lbs. should apply on basis of Trans-Continental rate \$1.30 plus rate of 65 cents per 100 lbs. found in P. F. T. B. Tariff 7, I. C. C. 14, Page 46, Item 82. However, it will be noted that this rate of 65 cents applies on *Wooden Sash* under the head of "Forest Products," and not on Steel Sash.

S. N. B.

[Endorsed]: "U. S. Dist. Court, Nor. Dist. of Cala. Pltff. Exhibit 3. W. B. M., Clerk." [44]

Plaintiff's Exhibit No. 4 [Comparison of Rates].

Comparison of Commodity Rates on Iron or
Steel Window Sash and Showing
Discrimination Against
Goldfield, Nevada.

From	To	Rate per 100#	Dis- tance Miles.	Rate per ton per Mile.	Name of Issue.	I. C. C. No.	Date Effective.	Page. Index.	Item or Compe- titive.
Chicago, Ill.,	Denver, Colo.,	.77	1034	.015	W. A. Potett	253	2/ 5/12	69	1385 Yes
Omaha, Neb.,	" "	.50	538	.02	" "	253	2/ 5/12	69	1385 "
New Orleans, La.,	" "	.77	1432	.011	" "	259	3/26/11	none	1615 "
Denver, Colo.,	Falls City, Neb.,	.50	551	.018	C. B. & Q. Ry.	9950	6/ 1/10	161	2945 "
Sacramento, Cal.,	Goldfield, Nev.,	2.14	428	.10	F. W. Gomph	14	1/20/10	46	82 "
Youngstown, Ohio,	" "	3.44	3267	.02	R. H. Countiss	929	10/10/10	94	none "
					F. W. Gomph	14	1/20/10	46	82 "

As charged \$1.30 plus \$2.14=\$3.44

BASIS OF COMPLAINT.

Sacramento, Cal.,	Goldfield, Nev.,	.65	428	.03
Youngstown, Ohio,	" "	1.95	3267	.012
[Endorsed]: "U. S. Dist. Court, Nor. Dist. of Cal. Pltff.				

Exhibit 4. W. B. M., Clerk."

Plaintiff's Exhibit No. 5.

Sash, Window, Iron.

Western Classification No. 50. F. J. Hoffman—I.

C. C. No. 8. May 1, 1911. Page 98. Item 15.

Sash, Iron, Window (other than sheet) unglazed,
boxed or crated.

L. C. L.	C. L.	Minimum.
2nd	4th	30,000

Official Classification No. 38. R. N. Collyer. I. C. C.

No. 38. March 1, 1913.

Sash, Iron or Steel	5th	34,000
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Sash, Wooden (not glazed)	5th	24,000
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Southern Classification No. 39. W. R. Power.

I. C. C. No. 17. June 17, 1912.

Sash, Wooden (not glazed)	6th	24,000
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Sash, Iron	6th	24,000
------------	-----	--------

Trans-continental Freight Bureau Tariff R. H.

Countiss' Agent, I. C. C. No. 929 October 10,
1910, Page 24.

Sash, Doors and Blinds etc., Wooden	\$1.30	30,000
-------------------------------------	--------	--------

Sash, Doors and Blinds, Iron or Steel		
etc.	1.30	30,000

Pacific Freight Tariff Bureau Tariff No. 7 F. W.

Gomph, Agent, I. C. C. No. 14. January 20,
1910. Pages 46 and 98, Index 90, Item 82.

Sash, Doors, Blinds, Wooden, etc.	.65¢	30,000
-----------------------------------	------	--------

Sash, Iron or Steel. 4th class.	\$2.14	30,000
---------------------------------	--------	--------

[Endorsed]: "U. S. Dist. Court, Nor. Dist. of
Cala. Pltff. Exhibit 5. W. B. M., Clerk." [46]

Plaintiff's Exhibit No. 6.

I. C. C. Docket No. 5064. \$447.00.

Steel Window Sash.

STATEMENT OF THE CASE.

This complaint covers a shipment of Steel Window Sash from Youngstown, Ohio, to Goldfield, Nevada.

Rate charged is made by adding to the Youngstown, Ohio, to Sacramento, California, terminal rate of \$1.30 per hundred pounds, minimum carload weight 30,000 pounds the local back Sacramento, Cal., to Goldfield, Nev., third class \$2.14 per hundred pounds minimum 30,000 pounds.

It will be observed (see exhibit No. 1) that West bound Trans-continental tariff R. H. Countiss' I. C. C. No. 929 effective October 10, 1910, page 94 provides same rate from Eastern defined territories to California terminals on Steel Sash in carloads, that applies on Wooden Sash in carloads, further that East bound Trans-continental Tariff R. H. Countiss' Agent I. C. C. No. 934 effective August 19, 1912, page 118 item No. 700 provides similar adjustment.

Official Classification No. 38 R. N. Collyers I. C. C. No. 38 effective March 1, 1912, page 209 item 9 names 5th class rating for both articles, also Southern Classification No. 39 W. R. Powers I. C. C. No. 17, effective June 17, 1912, page 47 item 30 and page 101 item 31 provides 6th class rating for Wooden Sash and Iron Sash in carloads minimum 24,000 pounds.

This would indicate that carriers believe that the Wooden Sash rate is a reasonable rate for Steel Sash.

We contend that if any difference exists Steel Sash

is the better freight from a transportation standpoint, weight, space and liability to damage considered, notwithstanding which we [47] find that the rate on Steel Sash carloads from Sacramento, Cal., to Goldfield, Nevada, is \$2.14 per hundred pounds as against rate of 65¢ per hundred pounds for Wooden Sash carloads.

Following the precedent established by the carriers on Trans-continental traffic and lines east of the Mississippi and south of the Ohio River, we are claiming that the Wooden Sash rate is a reasonable basis for making the through rate on Steel Sash.

From examination of specific publications (see exhibit No. 1) we find a rate of .77¢ per hundred pounds Chicago, Ill., to Denver, Colorado, for Steel Sash, distance 1034 miles producing a rate per ton per mile of .015. Find this same rate .77¢ published from New Orleans, Louisiana, to Denver, Colo., distance 1432 miles producing a rate per ton per mile of .011; From Omaha, Nebraska, to Denver, Colo., rate of .50¢ per hundred pounds for 538 miles producing a rate per ton per mile .02; From Denver, Colo., to Falls City, Nebraska. .50¢ per hundred pounds for distance 551 miles producing rate per ton per mile of .018.

These figures would indicate that the rate of \$2.14 per hundred pounds from Sacramento, Cal., to Goldfield, Nevada, a distance of 428 miles producing a rate per ton per mile of .10¢ cannot be justified. Let it be remembered however that the haul from Hazen, Nevada, to Sacramento, California, and return is not actually performed.

Considering the through rate charged of \$3.44 per hundred for distance 3267 miles over the route the shipment moved; Erie R. R.; E. J. & E. C. & N. W.; U. P. R. R., S. P. Co. and T. & G. R. R. producing a rate per ton per mile of .02¢ it will be observed that this is the same rate per ton per mile Omaha, Neb., to Denver, Colo., [48] for 538 miles; further that the rate of \$1.95 per hundred pounds which we are claiming produces a rate per ton per mile of .012 for 3267 miles, which is slightly greater rate per ton per mile than earned by carriers on shipments from New Orleans, Louisiana, to Denver, Colo., a distance of 1432 miles.

We, therefore contend that the rate we ask is reasonable and just both to the carrier and shipper.

[Endorsed]: "U. S. Dist. Court, Nor. Dist. of Cal. Pltff. Exhibit 6. W. B. M., Clerk." [49]

Plaintiff's Exhibit No. 7 [Proceedings Before Interstate Commerce Commission in Goldfield Con. M. & T. Co. vs. Chicago & Erie R. R. Co.].

Stenographer's Minutes.

Before the

INTERSTATE COMMERCE COMMISSION.

Docket No. 5064.

THE GOLDFIELD CONSOLIDATED MILLING
& TRANSPORTATION COMPANY,
Complainant,

vs.

CHICAGO & ERIE RAILROAD COMPANY et al.,
Defendants.

Reno, Nevada, October 18th, 1912, 10:30 A. M.

Before: A. B. PUGH, Special Examiner.

Met pursuant to notice.

APPEARANCES:

GEORGE S. MINOTT (829 Hearst Bldg., San Francisco), Attorney for Complainant.

H. A. SCANDRETT and C. W. DURBROW (San Francisco), Attorneys for the Union Pacific Railway Company and Southern Pacific Company.

HUGH H. BROWN (Tonopah, Nev.), Attorney for the Tonopah & Goldfield Railroad Company.

[50]

PROCEEDINGS.

Examiner PUGH.—The Interstate Commerce Commission, having set for hearing at this time and place, the case of the Goldfield Consolidated Milling & Transportation Company vs. Chicago & Erie Railroad Company et al., Docket 5064, the same is now called for that purpose. Who represents the complainant?

Mr. MINOTT.—I do, if the Court please.

Examiner PUGH.—Who represents the Chicago & Erie Railroad Company?

(No response.)

Examiner PUGH.—Erie Railroad Company?

(No response.)

Examiner PUGH.—Elgin, Joliet & Eastern Railway Company?

(No response.)

Examiner PUGH.—Chicago & North Western Railway Company?

(No response.)

Examiner PUGH.—Union Pacific Railroad Company?

Mr. DURBROW.—H. A. Scandrett and C. W. Durbrow.

Examiner PUGH.—Southern Pacific Company?

Mr. DURBROW.—The same.

Examiner PUGH.—The Tonopah & Goldfield Railroad Company?

Mr. BROWN.—Hugh H. Brown.

Examner PUGH.—This case involves a carload shipment of steel window sash and window sash parts from Youngstown, Ohio, to Goldfield, Nevada, for the transportation of which it appears charges were collected at the rate of \$1.30 per hundred pounds from Youngstown to Sacramento, California, and a rate of \$2.14 per hundred pounds from Sacramento to Goldfield, or a combination through rate of \$3.44 per hundred pounds. Complainants allege [52] that the charges were unreasonable to the extent that they exceeded charges that would have accrued at the rate of \$1.30 per hundred pounds to Sacramento and a rate of 65 cents per hundred pounds from Sacramento to Goldfield, or a combination through rate of \$1.95 per hundred pounds. Reparation is asked on that basis. Is that a correct statement of your petition, Mr. Minott?

Mr. MINOTT.—That is, if the Court please.

Examiner PUGH.—Any objection to it by the defendants?

Mr. DURBROW.—No.

Examiner PUGH.—Well, proceed with the testimony. Prove the complainant is a corporation.

Mr. MINOTT.—The same evidence as in the other case.

Mr. DURBROW.—We will stipulate to that. That is admitted by the answer.

Examiner PUGH.—All of them?

Mr. DURBROW.—That the complainant corporation is a corporation.

Examiner PUGH.—Do all the answers admit that?

Mr. DURBROW.—Yes, your Honor.

Examiner PUGH.—Very well. Go ahead.

Mr. MINOTT.—With respect to the routing. I have a bill of lading here that gives the route over which the shipment traveled.

Examiner PUGH.—Very well. Annex it to the freight bill and let me look at it.

Mr. DURBROW.—Those facts are likewise admitted by the answer.

Examiner PUGH.—The bill of lading shows routing Southern Pacific Company, and I understand counsel admits that they participated in the movement? [53]

Mr. DURBROW.—Yes, your Honor.

Examiner PUGH.—And the freight bills—let me look at them a moment. It seems to have been made out against the Goldfield Consolidated Milling Company, and the complainant is the Goldfield Consolidated Milling & Transportation Company. Are they the same?

Mr. MINOTT.—The same.

Examiner PUGH.—Let the bill of lading and freight bill be received as Complainant's Exhibit Number 1.

The freight bill and bill of lading so offered and identified was received in evidence, and thereupon marked "Complainant's Exhibit Number 1," received in evidence October 19th, 1912, and attached hereto.

Mr. MINOTT.—I have here a statement showing the rates for steel window-sash from Chicago to Denver, Omaha to Denver, New Orleans to Denver, and Denver, Colorado, to Fall City, Nebraska, which shows a comparison as against the rates from Sacramento to Goldfield on the same material, and the purpose of this exhibit is to show that in the various territories that the same rate is applied on steel window-sash as is applied to wooden sash, and that the rate on wooden sash from Sacramento to Goldfield is 65 cents as against the rate for steel window-sash of \$2.14.

Examiner PUGH.—The purpose of this is to support your allegation that the rates are unreasonable?

Mr. MINOTT.—Yes, sir.

Examiner PUGH.—This may be received as Complainant's Exhibit Number 2.

The statement so offered and identified was received in evidence and thereupon marked "Complainant's Exhibit Number 2," [54] received in evidence October 18th, 1912, and is attached hereto.

Mr. MINOTT.—This exhibit shows that the Official Classification provides the same rating for wooden

sash—or for steel sash, as that applicable to wooden sash.

Examiner PUGH.—The Official Classification?

Mr. MINOTT.—The Official Classification. And also the trans-continental Freight Bureau provides a commodity rate of \$1.30 per hundred pounds for steel sash and for wooden sash; further, that the Southern Classification provides the same rate for both.

Examiner PUGH.—This may be received as Complainant's Exhibit Number 3.

The statement so offered and identified, was received in evidence and thereupon marked "Complainant's Exhibit Number 3," received in evidence October 18th, 1912, and is attached hereto.

Mr. MINOTT.—This, your Honor, is a statement of the case which shows and points out that the steel window-sash in the different territories are graded on the same rate as wooden sash.

Examiner PUGH.—Your contention is based on the exhibits already filed, I suppose?

Mr. MINOTT.—Yes.

Examiner PUGH.—Have you a copy for counsel on the other side?

Mr. MINOTT.—Yes.

Examiner PUGH.—This may be filed as Complainant's Exhibit 4.

The statement so offered and identified, was received in evidence and thereupon marked "Complainant's Exhibit Number 4," received in evidence October 18th, 1912, and is attached hereto. [55]

Mr. MINOTT.—I have nothing further.

Examiner PUGH.—You have nothing to show the similarity of conditions?

Mr. MINOTT.—Except that, and that the rate is unreasonable as compared with the rate for wooden sash between the same points.

Examiner PUGH.—The case is with the defendants.

**[Testimony of S. N. Bostwick, Taken Before
Interstate Commerce Commission.]**

S. N. BOSTWICK, was called as a witness, and being duly sworn, testified as follows:

Direct Examination.

Mr. DURBROW.—You are the assistant general freight agent of the Southern Pacific Company?

Mr. BOSTWICK.—Yes, sir.

Mr. DURBROW.—Stationed at San Francisco?

Mr. BOSTWICK.—Yes, sir.

Mr. DURBROW.—What experience have you had in the traffic business, Mr. Bostwick?

Mr. BOSTWICK.—My present position, about 16 years, and 29 years altogether with the Southern Pacific Company, in the Traffic Department.

Mr. DURBROW.—I direct your attention to Complainant's Exhibit Number 2, in which a comparison is made in the rate on steel window-sash from Chicago, Omaha, New Orleans to Denver, Denver to Fall City, and Youngstown to Denver, Colorado, and will ask you to state, if you know, why it is that the rates shown from those points to Colorado are upon the basis shown in that exhibit.

Mr. BOSTWICK.—I can't state from my personal knowledge, as we had nothing to do with the making of the rates from these [56] eastern points to Colorado, but there is a large manufacturing plant located at Bessemer—the plant of the Colorado Fuel & Iron Company—that manufactures such products, and I imagine to such competitive territory the eastern lines found it necessary to place in effect those low rates.

Mr. DURBROW.—As a general proposition, taking into consideration the fact which you must always consider in making a rate to a point where a commodity such as this is manufactured, you do have the effect of forcing the rate down to lower than a normal scale?

Mr. BOSTWICK.—It certainly would.

Mr. DURBROW.—And by comparing these rates shown in exhibit number 2 with the rates contained in other tariffs and applying in other territory, would you say that these rates are exceptionally and unreasonably low?

Mr. BOSTWICK.—Unreasonably low.

Mr. DURBROW.—Is there any comparison between the rate applying on wooden sash and steel sash from a traffic standpoint, in the territory involved in this proceeding?

Mr. BOSTWICK.—There is quite a difference in the territory involved in this proceeding, from the fact that wooden sash rated at 65 cents per hundred pounds is contained under a grouping headed "Forest products," said grouping taking in lumber,

blinds, door sash, mouldings and other products, from California lumber producing and manufacturing points to the Tonopah and Goldfield territory. There is much building in that section or was when this rate was established. There was considerable use made of that rate on the products of lumber for the various mining enterprises, building up the town. The rate has been in effect for some time. It is [57] an abnormally low rate for the service, 516 miles, over the Sierras via Hazen, thence via a branch line to Mina, 129 miles, thence via another company the Tonopah & Goldfield Railroad Company, to Goldfield.

Mr. DURBROW.—Total haul being 516 miles.

Mr. BOSTWICK.—Total haul being 516 miles.

Mr. DURBROW.—And over an elevation of 7018 feet?

Mr. BOSTWICK.—Yes, sir; while the rate on steel window-sash is the Western Classification rate, which was so classified by representatives of all the lines west of Chicago, who meet periodically and who are traffic experts; and they have so classified it in the Western Classification. At the time of this classification, fourth class rate for steel window-sash was provided. Steel window-sash is an entirely different commodity from the forest product of wooden window-sash under the 65 cent rate named, our rate fourth class being \$2.14 per hundred pounds.

Mr. DURBROW.—Which commodity moves in greater volume?

Mr. BOSTWICK.—So far as the originating ter-

ritory and the destination in this complaint, wooden sash.

Mr. DURBROW.—State, if you know, whether there is any relation between the rates in the Official and Southern Classification, and the rates in the Western Classification on these two commodities.

Mr. BOSTWICK.—They are entirely separate classifications, covering distinct territories, and the mere fact that the official classification shows steel window-sash and wooden window-sash under the same class rate, or that the Southern Classification does likewise, I think has no bearing in this western country [58] and under the Western Classification controlling and governing this country west of Chicago. In fact, the rates under the Official Classification that would govern on wooden sash, might be high enough to warrant their application on the steel window-sash, considering volume of movement and value, liability to loss and damage, and nature of service, all of which have a bearing in the adjusting and making of freight rates. So I don't think the eastern proposition has any bearing on this Western Classification territory.

Mr. DURBROW.—You have a statement, have you not, showing the rate as constructed, giving the tariff reference?

Mr. BOSTWICK.—Yes, sir.

Mr. DURBROW.—We will file it as an exhibit, number 1, of the defendants.

Examiner PUGH.—It may be received as Defendant's Exhibit Number 1.

The statement so offered and identified, was re-

ceived in evidence, and thereupon marked "Defendants' Exhibit Number 1" received in evidence October 18th, 1912, and is attached hereto.

Mr. DURBROW.—Take the witness.

Cross-examination.

Mr. MINOTT.—Mr. Bostwick, you state that the rates in the western territory are made under a different condition than those in the eastern territory so far as the classification is concerned.

Mr. BOSTWICK.—I stated, I think, that the classifications governing the movement of freight in those three territories, under the Official Classification, under the Southern Classification, [59] and under the Western Classification, were entirely distinct from each other.

Mr. MINOTT.—Now, are you familiar with the making of the trans-continental rates?

Mr. BOSTWICK.—I am somewhat familiar with the rates, but not with the making of them.

Mr. MINOTT.—Now, the trans-continental tariff, I. C. C. 929, effective October 10th, 1910, provides the same rate for steel sash that is applicable under the wooden sash.

Mr. BOSTWICK.—That is correct.

Mr. MINOTT.—That is, to the western territory.

Mr. BOSTWICK.—I believe that is a rate of \$1.20 or \$1.30.

Mr. MINOTT.—\$1.30 on both?

Mr. BOSTWICK.—Lumber is much higher.

Mr. MINOTT.—The Official Classification provides fifth class rating for both.

Mr. BOSTWICK.—I believe it does.

Mr. MINOTT.—That is a very low rating, isn't it?

Mr. BOSTWICK.—I don't know whether it is.

Mr. MINOTT.—They run six classes, as you know.

Mr. BOSTWICK.—I know. It may be sufficiently high to satisfy the eastern lines to apply it on their wooden sash and on their steel sash.

Mr. MINOTT.—And the Southern Classification names sixth class?

Mr. BOSTWICK.—It may be satisfactory to them.

Mr. MINOTT.—This rate of 44 cents from Sacramento to Goldfield—the Southern Pacific do not actually perform the haul from Sacramento to Mina.
[60]

Mr. BOSTWICK.—They do.

Mr. MINOTT.—That is, all of the haul?

Mr. BOSTWICK.—They do.

Mr. MINOTT.—You mean to tell me in connection with the trans-continental rate that the Southern Pacific haul this steel sash to Sacramento?

Mr. BOSTWICK.—Oh, I thought you meant our line did not extend there. I mean to say that under the ruling of the Interstate Commerce Commission we are not obliged to perform the back haul when the rate is a combination on the terminal and the local back.

Mr. MINOTT.—Then the distance from Sacramento to Goldfield is 428 miles.

Mr. BOSTWICK.—It is 90 miles less than 516.

Mr. MINOTT.—Now, that produces a rate per ton per mile of 10 cents, and you do not actually perform all the service from Sacramento to Mina, in using

this \$2.14 rate added to the rate carried in the trans-continental tariff of \$1.30.

Mr. BOSTWICK.—It depends upon the routing from the east. If it came via Ogden, no; if it comes via Mojave or El Paso, it would be taken to Sacramento and we would have to perform the full service.

Mr. MINOTT.—This shipment actually moved through the Ogden gateway.

Mr. BOSTWICK.—Under those circumstances the rate is based on the terminal with the local back, and by special permission of the Commission, they do not require the back haul.

Mr. MINOTT.—You do not move any traffic through the El Paso gateway destined to Goldfield?
[61]

Mr. BOSTWICK.—Yes, we do.

Mr. MINOTT.—Well, in that event, the rate would not be based on Sacramento, would it?

Mr. BOSTWICK.—Certainly.

Mr. MINOTT.—You would move it around through the Sacramento gateway?

Mr. BOSTWICK.—It would be based upon the rate from the nearest terminal.

Mr. MINOTT.—But that would be an unnatural movement, wouldn't it?

Mr. BOSTWICK.—I should say yes, from Youngstown, Ohio.

Mr. MINOTT.—Isn't it a fact that the steel sash and wooden sash compete?

Mr. BOSTWICK.—I don't know that I can answer that question. I would ordinarily say that, as a general proposition, they do not. The wooden

sash is used for building dwellings, as well as for building factories and other such work where steel sash would not be required at all. When it comes to a smelter proposition, the Goldfield Consolidated Company, whether there it strictly competes or they require as much window-sash of steel as they do of wood, I couldn't answer that. I think as a general proposition they don't compete.

Mr. MINOTT.—From a railroad standpoint, isn't steel sash better freight than wooden sash?

Mr. BOSTWICK.—It would certainly weigh heavier for the same space occupied in a car.

Mr. MINOTT.—Isn't it the policy of the carrier in making rates to give the iron and steel articles better rates than those applicable to wooden articles, as a general proposition?

Mr. BOSTWICK.—Well, naturally we take into account the additional weight we get from the iron and steel articles, but [62] unless we thought it is absolutely necessary in fixing a tariff covering a great number of articles that we handle, the value should enter into the rate-making proposition. We could not move sawdust at the rate on silk, and we could not apply as high a rate as applies on silk to move sawdust. Sawdust would not be forwarded. Therefore, as an example between extremes, we have to value things somewhat in the fixing of freight rates, so that value is taken into account.

Mr. MINOTT.—Steel sash is not subject to damage in any respect—that is, any more than wooden sash, is it?

Mr. BOSTWICK.—I don't know that it would be

any more than wooden sash. They are both subject to damage in case of wreck.

Mr. MINOTT.—Well, the carrier don't run any more risk in transporting the steel sash than he does in transporting wooden sash, does he?

Mr. BOSTWICK.—I have not examined into any large number of loss and damage claims for either of these commodities as compared with each other, and I could not answer.

Mr. MINOTT.—Well, don't you feel, in view of the rate for iron and steel articles generally, that ten cents per ton per mile is rather a high figure for this class of material?

Mr. BOSTWICK.—Not at all. I have a very high respect for the framers of the Western Classification to put it fourth class when they put these other iron articles at fifth class.

Mr. MINOTT.—That is, from a classification point of view.

Mr. BOSTWICK.—Well, that is a rate-making point of view.

Mr. MINOTT.—And the trans-continental tariff provides the same rate for both. Now, the carriers assume the same risk in transporting those articles, don't they, in the trans-continental [63] territory that they do from Sacramento to Goldfield?

Mr. BOSTWICK.—The rate on wooden sash under the trans-continental may be high enough to warrant them in applying that on steel sash, the same as under the Official Classification and the Southern Classification, but just what influence there was in making the rate the same, I don't know.

It is generally classified much higher. I couldn't testify as to that.

Mr. MINOTT.—Well, you have a statement there of the rate from Denver, Colorado, to Fall City, Nebraska, showing 50 cents per hundred pounds for steel sash, a distance of 551 miles, which results in a rate per ton per mile of one cent and eight mills. That distance is greater than the distance from Sacramento to Goldfield, and there is a difference in the rate of \$1.64 a hundred. Now, that is through a mountainous country.

Mr. BOSTWICK.—That looks to me like a reasonable rate. The rate from Omaha to Denver being the same 50 cents, the manufacturer in Colorado, getting back to Fall City was given 50 cents. I think that would naturally explain that, one from one direction and the other from the other, the same distance.

Mr. MINOTT.—That is all.

Mr. DURBROW.—That is all. We have no further evidence.

Mr. MINOTT.—We have nothing further.

Examiner PUGH.—Nothing further being offered by either side, the case will be considered as closed, so far as the testimony is concerned. Do you desire to file a brief on either side?

Mr. DURBROW.—We would like to file a brief.

Examiner PUGH.—Complainant does not wish to file a brief, and defendant expressing the desire to do so, the defendant will be allowed until November 30th in which to file and [64] serve a brief in support of its contentions.

Mr. DURBROW.—I ask that we may have until November 30th within which to file and serve a brief. I ask it because we have so many other cases to write briefs in.

Examiner PUGH.—In view of the statement of counsel as to the writing of other briefs, defendant will be allowed until November 30th. That is all.

Whereupon at 12:30 o'clock P. M. on the 18th day of October, 1912, the hearing of the above-entitled matter was closed.

It is further certified that no written notice of the rendition of the decision in this case was ever served on defendants, or either of them, nor was service of such notice waived; and the foregoing bill of exceptions was tendered within the time allowed by law and the rules of this court.

And the said defendants within the time allowed by law and the rules of Court hereby propose the foregoing bill of exceptions containing all the proceedings had on the trial of said cause, and pray that the same be settled, allowed and signed by the Judge of this Court and made a part of the record in this cause.

Dated. May 29th, 1914.

HUGH H. BROWN,
HENLEY C. BOOTH,
C. W. DURBROW,
GEO. D. SQUIRES,

Attorneys for Said Defendants, Southern Pacific
Company and Tonopah & Goldfield Railroad Co.

[Stipulation Re Bill of Exceptions.]

It is hereby stipulated that the foregoing bill of exceptions contains all of the evidence introduced at the trial of the above-entitled cause, including all exhibits offered and introduced by either party; and that the said bill of exceptions may be settled and allowed and made a part of the record herein.

Dated June 25th, 1914.

BROWN & BAER,

Attorneys for Plaintiff.

HUGH H. BROWN,

HENLEY C. BOOTH,

C. W. DURBROW,

GEO. D. SQUIRES,

Attorneys for Defendants.

[Order Settling, etc., Bill of Exceptions.]

The foregoing bill of exceptions, duly proposed and agreed upon by counsel for the respective parties, is correct in all respects and is hereby settled, approved, allowed and made a part of the record herein.

Dated this 29th day of June, 1914.

WM. C. VAN FLEET,

United States District Judge. [66]

Service of the within Bill of Exceptions is admitted this 29th day of May, 1914.

BROWN & BAER,

Attorneys for Plaintiff.

Service of the within Bill of Exceptions, as agreed upon by counsel for the respective parties, and as

settled and allowed by the Court, is hereby admitted this 17th day of July, 1914.

BROWN & BAER,
Attorneys for Plaintiff.

[Endorsed]: Filed Jul. 9, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [67]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 15,700.

GOLDFIELD CONSOLIDATED MILLING &
TRANSPORTATION CO., a Corporation,
Complainant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
and TONOPAH & GOLDFIELD RAIL-
ROAD COMPANY, a Corporation,
Defendants.

Petition for Writ of Error.

To the Honorable WILLIAM C. VAN FLEET, as
Judge of the Above-entitled Court:

Now come the above-named defendants, Southern Pacific Company, a corporation, and Tonopah & Goldfield Railroad Company, a corporation, by Hugh H. Brown and C. W. Durbrow, their attorneys, and say that on or about the 27th day of March, 1914, this Court entered judgment herein in favor of plaintiff and against defendants, in which judgment and the proceedings prior thereunto in this case certain errors were committed to the prejudice of these

defendants, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE these defendants pray that a writ of error may issue in their behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the said United States [68] Circuit Court of Appeals for the Ninth Circuit.

Dated this 18th day of July, 1914.

HUGH H. BROWN,

C. W. DURBROW,

Attorneys for said Defendants.

Service, by copy, of the within Petition for Writ of Error is hereby admitted this 18th day of July, 1914.

BROWN & BAER,

Attorneys for Plaintiff.

[Endorsed]: Filed Jul. 21, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [69]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 15,700.

GOLDFIELD CONSOLIDATED MILLING &
TRANSPORTATION COMPANY, a Corpo-
ration,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
and TONOPAH & GOLDFIELD RAIL-
ROAD COMPANY, a Corporation,

Defendants.

Assignment of Errors.

Now come the above-named defendants, Southern Pacific Company, a corporation, and Tonopah & Goldfield Railroad Company, a corporation, and in connection with their petition for a writ of error, make the following assignment of errors which they aver were committed by the Court upon the trial of this cause and in the rendition of the judgment against these defendants appearing upon the record herein, to wit:

I. The Court erred in holding and deciding that the complaint of plaintiff stated facts sufficient to constitute a cause of action.

II. The Court erred in holding and deciding that the complaint stated facts sufficient to constitute a cause of action against defendants Southern Pacific Company and Tonopah & Goldfield Railroad Com-

pany, or either of said defendants.

III. The Court erred in overruling, and in not sustaining, the demurrer interposed by said defendants to plaintiff's complaint.

IV. The Court erred in holding that the decision and [70] order of the Interstate Commerce Commission, in the proceeding entitled: "The Goldfield Milling & Transportation Company, Complainant, vs. Chicago & Erie Railroad Company et al., Defendants, Docket No. 5064," which decision and order was introduced in evidence by plaintiff upon the trial of this cause, was supported by the evidence introduced before the Interstate Commerce Commission upon the hearing of said proceeding.

V. The Court erred in holding that the said decision and order of the Interstate Commerce Commission in said proceeding were valid.

VI. The Court erred in holding that plaintiff had proved that it had been injured and had sustained damages in the sum awarded by the Interstate Commerce Commission in the said decision and order in said proceeding, or in any other sum, and also in holding that said Commission's order of reparation was a *prima facie* showing sufficient to justify the Court in deciding that plaintiff was entitled to an award of damages.

VII. The Court erred in holding and deciding that said decision and order of the Interstate Commerce Commission were sufficient proof in and of themselves, without further evidence, of the damage sustained by plaintiff; and the Court erred in basing its decision awarding said damages to plaintiff upon

the said decision and order of the Commission, without requiring further proof of the loss or damage sustained by plaintiff.

VIII. The Court rendered judgment against the defendants, whereas judgment ought to have been rendered in favor of defendants and against the plaintiff.

WHEREFORE, said defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company, plaintiffs [71] in error, pray that the judgment of said District Court may be reversed, and that said defendants may have judgment against plaintiff for their costs and disbursements herein expended.

HUGH H. BROWN,

C. W. DURBROW,

Attorneys for Defendants Southern Pacific Company
and Tonopah and Goldfield Railroad Company,
Plaintiffs in Error.

Service of the within Assignment of Errors is admitted this 18th day of July, 1914.

BROWN & BAER,

Attorneys for Plaintiff.

[Endorsed]: Filed Jul. 21, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [72]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 15,700.

GOLDFIELD CONSOLIDATED MILLING &
TRANSPORTATION CO., a Corporation,
Complainant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
and TONOPAH & GOLDFIELD RAIL-
ROAD COMPANY, a Corporation,
Defendants.

**Order Allowing Writ of Error [and Fixing Amount
of Bond].**

On this 21st day of July, 1914, came the above-named Southern Pacific Company, a corporation, and Goldfield & Tonopah Railroad Company, a corporation, defendants, by Hugh H. Brown and C. W. Durbrow, their attorneys, and filed herein and presented to this Court their petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises. On consideration whereof this Court does allow the writ of error upon the said defendants giving bond according to law

in the sum of One Thousand (\$1,000) Dollars, lawful money of the United States, which said bond shall operate as a supersedeas bond.

Dated at San Francisco, this 21st day of July,
A. D. 1914.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Jul. 21, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [73]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 15,700.

GOLDFIELD CONSOLIDATED MILLING &
TRANSPORTATION COMPANY, a Corpo-
ration,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
and TONOPAH & GOLDFIELD RAIL-
ROAD COMPANY, a Corporation,
Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that
whereas, lately in a District Court of the United
States, in and for the Northern District of California,
Second Division, in a suit depending in said court
between the Goldfield Consolidated Milling & Trans-
portation Company, a corporation, as plaintiff, and

Southern Pacific Company, a corporation, and Tonopah & Goldfield Railroad Company, a corporation, as defendants, a judgment was rendered against the said Southern Pacific Company, a corporation, and said Tonopah & Goldfield Railroad Company, a corporation, for the sum of \$536.55, together with an attorney's fee in the sum of \$150.00 and the further sum of \$20.50 costs and disbursements, and said Southern Pacific Company, a corporation, and said Tonopah & Goldfield Railroad Company, a corporation, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit and a citation having issued directed to said Goldfield Consolidated [74] Milling & Transportation Company, a corporation, citing and admonishing it to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, in said court, on the 21st day of August, 1914.

NOW, THEREFORE, in consideration of the premises and of such writ of error the United States Fidelity & Guaranty Company, a corporation organized and existing under the laws of the State of Maryland and having its principal place of business in the city of Baltimore, in said State, and having a paid-up capital and surplus of Two Million Dollars (\$2,000,000), duly incorporated under the laws of said State of Maryland for the purpose of making and guaranteeing and becoming surety upon bonds or undertakings required or authorized by law, and which said corporation has complied with all the re-

quirements of the laws of the State of California regulating the admission and right of said corporation to transact such business in said State, is held and firmly bound unto the above-named plaintiff, Goldfield Consolidated Milling & Transportation Company, a corporation, in the full and just sum of One Thousand Dollars (\$1,000), lawful money of the United States, to be paid to said plaintiff, Goldfield Consolidated Milling & Transportation Company, its successors or assigns, for which payment well and truly to be made, the said United States Fidelity & Guaranty Company, a corporation, binds itself by these presents.

The condition of the above obligation is such that if the said Southern Pacific Company, a corporation, and said Tonopah & Goldfield Railroad Company, a corporation, the defendants in said action, and plaintiffs in error aforesaid, [75] shall prosecute said writ of error to effect and answer all damages and costs that may be awarded against them if they fail to make their said plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the said United States Fidelity & Guaranty Company, a corporation, has caused this obligation to be signed by its duly authorized attorney in fact and its corporate seal to be here-

unto affixed at San Francisco, California, this 23d day of July, 1914.

UNITED STATES FIDELITY & GUAR-
ANTY CO.

[Seal]

By JAMES H. BORLAND,
Attorney in Fact.

By W. S. ALEXANDER,
Attorney in Fact.

The above and foregoing bond upon writ of error is hereby approved, and execution stayed pending the determination of said writ.

Dated July 23d, 1914.

WM. C. VAN FLEET,
Judge.

State of California,

City and County of San Francisco,—ss.

On this 23d day of July, in the year of one thousand nine hundred and fourteen, before me, M. J. Cleveland, a Notary Public in and for the City and County of San Francisco, personally appeared James H. Borland and W. S. Alexander, known to me to be the persons whose names are subscribed to the within instrument as the attorneys in fact of the United States Fidelity and Guaranty Company, and acknowledged to me that they subscribed the name of the United [76] States Fidelity and Guaranty Company thereto, as principal, and their own names as attorneys in fact.

[Seal]

M. J. CLEVELAND,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed July 23d, 1914. Walter B. Maling, Clerk. [77]

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

CLERK'S OFFICE.

No. 15,700.

GOLDFIELD CONSOLIDATED MILLING &
TRANSPORTATION COMPANY

VS.

SOUTHERN PACIFIC COMPANY and TON-
OPAH & GOLDFIELD RAILROAD COM-
PANY.

Praeipie [for Transcript of Record].

To the Clerk of said Court:

Sir: Please prepare and transmit to the Circuit Court of Appeals for the Ninth Circuit, under your hand and the seal of the above-entitled court, on or before the return day of the Writ of Error issued in this cause, to wit, on or before the 21st day of August, 1914, a true copy of the record, opinion of the Court, bill of exceptions, assignment of errors, and all proceedings in this cause, together with the original writ of error and citation issued in this cause.

Dated, July 24th, 1914.

HUGH H. BROWN,
C. W. DURBROW,

Attorneys for Defendants and Plaintiffs in Error.

[Endorsed]: Filed Jul. 24, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [78]

*In the District Court of the United States, for the
Northern District of California, Second Divi-
sion.*

No. 15,700.

GOLDFIELD CONSOLIDATED MILLING &
TRANSPORTATION COMPANY, a Cor-
poration,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion, and TONOPAH & GOLDFIELD RAIL-
ROAD COMPANY, a Corporation,

Defendants.

**Certificate of Clerk U. S. District Court to Record
on Writ of Error.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing seventy-eight (78) pages, numbered from 1 to 78, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$45.60; that said amount was paid by the attorneys for the defendant, and that

the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 21st day of August, A. D. 1914.

[Seal]

WALTER B. MALING,

Clerk. [79]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable, the Judge of the District Court of the United States for the Northern District of California, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the March, 1914, term thereof, wherein Southern Pacific Company, a corporation, and Tonopah & Goldfield Railroad Company, a corporation, are plaintiffs in error, and Goldfield Consolidated Milling & Transportation Company, a corporation, is defendant in error, and wherein Goldfield Consolidated Milling & Transportation Company, a corporation, was plaintiff, and Southern Pacific Company, a corporation, and Tonopah & Goldfield Railroad Company, a corporation, were defendants, manifest error hath happened to the great damage of the said Southern Pacific Company, a corporation, and Tonopah & Goldfield Railroad Company, a corporation, plaintiffs in error, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 21st day of August, 1914, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according [80] to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of the District Court of the United States for the Northern District of California, the 23d day of July, in the year of our Lord One Thousand Nine Hundred and Fourteen.

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States for
the Northern District of California, Second
Division.

Allowed by

WM. C. VAN FLEET,
United States District Judge. [81]

[Return to Writ of Error.]

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [82]

Service of the within Writ of Error is admitted this 24th day of July, 1914.

BROWN & BAER,

Attorneys for Plaintiff and Defendant in Error.

[Endorsed]: No. 15,700. District Court of the United States for the Northern District of California, Second Division. Southern Pacific Company et al., Plaintiffs in Error, vs. Goldfield Consolidated Milling & Transportation Company, Defendant in Error. Writ of Error. Filed Jul. 24, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Citation on Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Goldfield Consolidated Milling and Transportation Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 21st day of August, 1914, being within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the Northern District of California, Second Division, wherein Southern Pacific Company, a corporation, and Tonopah & Goldfield Railroad Company, a corporation, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Southern Pacific Company, a corporation, and Tonopah & Goldfield Railroad Company, a corporation, plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, Second Division, this 23d day of July, A. D. 1914.

WM. C. VAN FLEET,
United States District Judge. [83]

Service of the within Citation is admitted this 24th day of July, 1914.

BROWN & BAER,
Attorneys for Plaintiff and Defendant in Error.

[Endorsed]: No. 15,700. District Court of the United States, for the Northern District of California, Second Division. Goldfield Consolidated Milling & Transportation Co., Plaintiff, vs. Southern Pacific Company et al., Defendants. Citation. Filed Jul. 24, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2467. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, and Tonopah & Goldfield Railroad Company, a Corporation, Plaintiffs in Error, vs. Goldfield Consolidated Milling and Transportation Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Received and filed August 21, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY and
TONOPAH & GOLDFIELD RAIL-
ROAD COMPANY, a Corporation,
Plaintiffs in Error.

vs.

GOLDFIELD CONSOLIDATED MILL-
ING & TRANSPORTATION COM-
PANY, a Corporation,
Defendant in Error.

No. 2467

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR

HUGH H. BROWN

C. W. DURBROW

Attorneys for Plaintiffs in Error.

WM. F. HERRIN

Of Counsel.

Filed this.....day of....., 1914

FRANK D. MONCKTON,

Clerk,

By.....

Deputy Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY and
TONOPAH & GOLDFIELD RAIL-
ROAD COMPANY, a Corporation,
Plaintiffs in Error.

VS.

GOLDFIELD CONSOLIDATED MILL-
ING & TRANSPORTATION COM-
PANY, a Corporation,
Defendant in Error.

No. 2467

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR

STATEMENT OF CASE.

This suit was instituted by the Defendant in Error for the purpose of recovering the sum of Four Hundred and Forty-seven Dollars (\$447.00) which represents the difference between the rates charged by plaintiffs in error and their eastern connections for transporting steel window sash from Youngstown, Ohio, to Goldfield, Nevada, and the rate which the Commission ordered the carriers to publish for performing the same service.

Complaint was originally filed before the Interstate Commerce Commission entitled "Goldfield Consolidated Milling & Transportation Company vs. Chicago & Erie Railroad Company, et al." and was numbered 5064.

This petition alleged that the rate which had been published by the carriers, \$3.44 per hundred pounds, for transporting shipments of this commodity between the points specified was unreasonable and prayed that an order be entered that the rate of \$1.95 was a reasonable rate and that the carriers be required to assess their charges on this basis.

The Commission, after hearing, rendered its decision holding that the rate complained of was unreasonable and entered an order requiring the carriers to publish the rate of \$1.95 held by the Commission to be reasonable, and awarded reparation to the complainant in the amount specified.

Thereupon, the carriers filed with the Interstate Commerce Commission a petition for rehearing, which was subsequently denied, and, upon the denial of the petition for rehearing, the rate prescribed by the Commission was published as ordered.

Defendant in Error then filed this suit in the United States District Court, praying judgment for Four Hundred and Forty-seven Dollars (\$447.00) together with interest at seven per cent. (7%) and for attorneys' fees in the sum of Two Hundred and Fifty Dollars (\$250).

As is disclosed by the transcript of record, Defendant in Error offered in evidence the decision and order of the Commission and the Reporter's transcript of the testimony taken at the hearing before the Commission and certain exhibits offered at the hearing and rested its case upon this showing.

No evidence was introduced on behalf of the carriers.

SPECIFICATIONS OF ERROR RELIED UPON

There are eight specifications in the assignment of errors contained in the transcript of record, pages 72 to 74 inclusive, which briefly stated are:

(1) That the court erred in holding that the decision and order of the Commission were supported by the evidence introduced before the Commission and in holding that the decision and order were valid.

(2) That the court erred in overruling the demurrer interposed by Plaintiffs in Error.

(3) That the court erred in holding that Defendant in Error had proved that it had been injured and had sustained damage in the sum awarded by the Commission by way of reparation, and that the Commission's order of reparation was a prima facie showing sufficient to justify the court in finding that Defendant in Error was entitled to an award of damages.

THE LAW

Before arguing the specific legal propositions which will be directed to the court's attention, it may serve the convenience of the court to make a brief reference to the underlying and fundamental principles which govern in proceedings of this character.

JURISDICTION

It becomes important at the outset to correctly define the jurisdiction which may be exercised by the Interstate Commerce Commission and the jurisdiction which may be exercised by the courts. In other words, to draw a sharp line between the jurisdiction of the legislative and judicial tribunals. In this connection it is necessary to do no more than refer to the leading and recently decided case of *Prentis, etc. v. Atl. Coast Line*, 211 U. S. 210, 226, wherein the court holds that although a state Corporation Commission may exercise quasi judicial functions in the first instance in determining the reasonableness of a rate, that it is the final act taken by the Commission, the prescribing of a rate for the future, which gives character to the entire proceeding, and that the act of the Commission is purely legislative and not in any sense judicial.

The Supreme Court has further held that the jurisdiction of the courts cannot attach in cases such as this until the reasonableness of a rate has, in the first instance, been determined by the legis-

lative tribunal, the Interstate Commerce Commission.

Abilene Cotton Oil Case, 204 U. S. 426;

Robinson vs. B. & O. R. Co., 222 U. S. 506,
511.

A question is raised that the Commission has rendered a decision and order upon which a suit before the District Court of the United States was properly predicated so far as the jurisdictional question is concerned, and it, therefore, becomes important to determine how far the jurisdiction of the District Court extends.

The authorities are uniform in holding that where the validity of the Commission's decision and order is put in issue, as in the case at bar where the validity of the Commission's order is questioned in the special defense pleaded in the answer, it is the duty of the Federal courts to examine into this question upon a trial *de novo* in order to determine whether the Commission's order is (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. Questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) *if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or*

without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determine the validity of the exercise of the power.

- I. C. C. v. Union Pacific RR. Co., 222 U. S., 541-546;
- I. C. C. v. Ill. Cent. RR. Co., 215 U. S. 452-470;
- S. P. Co. v. I. C. C., 219 U. S. 433;
- I. C. C. v. Nor. Pac. Ry. Co., 216 U. S. 538-544;
- I. C. C. v. Ala. Midland Ry. Co., 168 U. S. 144;
- I. C. C. v. Louisville & Nashville RR. Co., 227 U. S. 88.

THE DECISION AND ORDER OF THE COMMISSION ARE NOT SUPPORTED BY THE EVIDENCE INTRODUCED AT THE HEARING AND THE ORDER IS THEREFORE VOID AND THE COURT WITHOUT JURISDICTION.

In determining the question of the validity of the order it should be kept in mind that the question presented is not whether the rate *prescribed by the Commission* is just and reasonable but whether the *rate fixed by the carriers* and of which complaint was made was unjust or unreasonable, for the reason that unless the rate fixed by the carrier was unjust or unreasonable,—and this fact was estab-

lished by the evidence at the hearing—the Commission never became vested with jurisdiction to prescribe the rate set forth in its order.

The carrier is the primary rate maker and unless the evidence introduced at the hearing warrants the conclusion as a matter of law that the rate fixed by the carrier is unjust and unreasonable in and of itself, having regard to the service rendered, the Commission has no authority to set it aside and fix a different rate.

There must be competent evidence before the Commission to show that the rate fixed by the carrier is unjust and unreasonable in the sense stated because the statute does not authorize the Commission to set aside a rate simply because, in *its* judgment, the carrier can afford to make a lower rate or because a lower rate is necessary to meet competition. These principles are fully supported by the decisions.

In *I. C. C. vs. Louisville & Nashville RR. Co.*, 227 U. S. 88, 92, the Supreme Court, speaking by Mr. Justice Lamar, said:

“Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission’s right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order.

Int. Com. Comm. v. Northern Pacific Ry., 216 U. S. 538, 544. In a case like the present the courts will not review the Commission's conclusions of fact (Int. Com. Comm. v. Delaware &c. Ry., 220 U. S. 235, 251), by passing upon the credibility of witnesses, or conflicts in the testimony. *But the legal effect of evidence is a question of law.* A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, 'be set aside by a court of competent jurisdiction.' 36 Stat. 551." (Italics ours.)

In Southern Pacific Company v. Interstate Commerce Commission, 219 U. S. 433, the Supreme Court held:

"The powers of the Interstate Commerce Commission do not extend to regulating and controlling the policy of the owners of railroads in fixing rates, and it cannot substitute for a just and reasonable rate, a lower rate, either on the ground of policy or on the ground that the railroad was by its former conduct estopped from charging a reasonable rate."

It is to be noted that in the last case cited the Supreme Court looked through the form of the Commission's finding to the substance of its decision. It must appear from the Commission's decision that the grounds upon which the Commission based its order were such as to justify a finding that the rate fixed by the carrier was, in itself, unjust and unreasonable. It is not a question as to which is the

more reasonable rate—the primary question is whether the carrier's rate was unreasonable and unjust in and of itself, having regard to the service rendered.

The burden of proving the unreasonableness of the rate, of which complaint is made in the proceedings before the Commission, rests on the complainant.

Chicago Great Western Case, 209 U. S. 108;
Illinois Central v. I. C. C., 206 U. S. 441, 464.

These authorities establish the proposition that, unless the complainant himself introduces substantial evidence to support the allegations of the petition, the complaint must be dismissed.

THE TRANSCRIPT OF EVIDENCE DISCLOSES THAT THERE WAS NO SUBSTANTIAL EVIDENCE INTRODUCED BY COMPLAINANT TO SUPPORT COMMISSION'S DECISION AND ORDER BUT THAT ON THE CONTRARY THE DECISION AND ORDER ARE AGAINST AND OPPOSED TO THE EVIDENCE.

The transcript introduced in evidence in the case at bar discloses that the routing of the shipment was shown by the introduction of bill of lading, that a statement was introduced showing the rates applying on Steel Window Sash from Chicago to Denver, Omaha to Denver, New Orleans to Denver, to Falls City, Nebraska, and according to the statement of

counsel for complainant "the purpose of this exhibit is to show that in the various territories the same rate is applied on Steel Window Sash as is applied to Wooden Sash, and that the rate on Wooden Sash from Sacramento to Goldfield is sixty-five cents (65c) as against the rate on Steel Window Sash of two dollars and fourteen cents (\$2.14)." Other exhibits were introduced showing that the same rating is applied on Steel as Wooden Sash in Official Classification territory and that a commodity rate is applied on the Steel Sash the same as for Wooden Sash in Southern Classification territory and that the rates on Steel Window Sash in the different territories are graded on the same rate as Wooden Sash.

According to the statement of counsel for complainant, these exhibits were introduced to show that the rate on Wooden and Steel Sash was the same in other territories, from which the inference was drawn that the same rate should be applied on Steel as Wooden Sash on the shipment in question. This is all the evidence which was introduced by complainant and it is significant that, when complainant's counsel announced that they had nothing further to introduce, the Examiner who presided at the hearing asked "You have nothing to show the similarity of conditions?", to which counsel for complainant answered "except that and that the rate is unreasonable as compared with the rates for Wooden Sash between the same points." (Transcript, page 58)

Carriers' Evidence.

The carriers introduced evidence showing that the rates specified in complainant's exhibits had been forced down to lower than a normal basis because of competitive conditions and that the rates relied upon by complainant by way of comparison were, in fact, competitive rates and by comparison with normal rates were "exceptionally and unreasonably low" (Transcript, pages 58-59), and that, in fact, the rates in controversy were abnormally low and had been established upon this low basis because of competitive conditions and the expense of hauling the shipments over the territories was unusually heavy (Transcript, pages 60-61); that the Steel Window Sash is an entirely different character than the Wooden Sash; that the Wooden Sash moves in greater volume and that because of the dissimilarity of circumstances and conditions surrounding the haul of these commodities in Official and Southern Classification territory and Western Classification territory, the rates in the other territories did not furnish a proper basis of comparison. (Transcript, pages 60, 61)

Even though no consideration be given to the evidence introduced by the carriers, which stands uncontradicted, and reference be had only to the evidence introduced by complainant, it must appear that the decision and order are not supported by the evidence.

The authorities already cited are conclusive in showing that the court must determine *as a matter*

of law whether the evidence introduced before the Commission was sufficient. The insufficiency of this evidence is easily demonstrable by reliance upon the rules established by the Commission itself and which have been approved by the Federal courts. The rates in controversy are competitive rates and have been held to be such by the Commission itself,

City of Spokane vs. Northern Pacific Ry. Co.,
15 ICC 376; s. c. 19 ICC 162.

The rates in controversy are constructed by adding to the terminal rate, Youngstown to Sacramento, the proximate terminal,—a rate established as found by the Commission in the cases last cited to meet the competition of sea carriers and upon lower than a normal basis,—the rate from the proximate terminal, Sacramento, to Goldfield. This basis of rate-making has been expressly approved by the Supreme Court of the United States.

I. C. C. vs. Louisville & N. Rd. Co., 190
U. S. 273.

It therefore appears that the shipment in question moved under a rate which had been established upon lower than a normal basis to meet competitive conditions. The Commission is without power to reduce such a rate except upon substantial evidence.

Further, according to the undisputed testimony, the Commission undertook to determine the reasonableness of these rates by comparing them with

rates which were competitive. Such comparisons cannot be made.

Mayor of Wichita Case 9 ICC 555;
 Northwest Lumber Cases, 14 ICC 1, 14;
 Burnham-Hanna-Munger vs. CRI&P, 14 ICC
 299, 310, affirmed by the Supreme Court
 of the United States 218 U. S. 88.

As has already been shown, the only evidence introduced by complainant before the Commission was tables of other rates in other territories which were intended to serve as bases of comparison. Such evidence cannot be considered substantial evidence as defined by the Supreme Court in the cases of Union Pacific Railroad Company v. I. C. C., 222, U. S. 541 and Louisville & Nashville v. I. C. C., 227 U. S. 88 for the reason that the Commission and the Supreme Court have held uniformly that before such rates may be used as a basis of comparison, it is incumbent upon the person making such comparisons to show the similarity or dissimilarity of circumstances and conditions surrounding the haul in the several territories.

Smyth vs. Ames, 169 U. S. 466, 540.

The rule is well stated in the case of Railroad Commission of Montana v. Northern Pacific Railway Company, 26 ICC 407, 408:

"There is no evidence submitted as to the similarity of transportation conditions or the volume of the traffic under the respective rates involved in these comparisons.

* * * * *

The party at whose instance a proceeding is brought should be represented by some one able to give full and specific information as to the nature and extent of its business and the specific commodity it handles. The Commission is not justified in condemning the rates under consideration upon the mere impressions and comparisons in this record. It may act in any case only upon facts and conditions duly established. And in its endeavor to ascertain these facts it should be aided in every possible way by the party on whose behalf complaint is filed who is presumably the most competent to render that aid, with respect, at least, to the character of the commodity in issue.

If we should condemn the present rates upon this record we would in effect be acting upon no evidence or information except a comparison of rates pointed out from tariffs on file with this Commission by the Railroad Commission of Montana."

The rules which govern and bind the Commission in determining questions such as were submitted to them in the case at bar are well stated by Mr. Commissioner Harlan in the Memphis Cotton-Seed Oil Case, 17 ICC 313, 318. In the case at bar the Commission have violated all these principles of rate making and have done exactly what they say they should not do in the case of Montana Railroad Commission v. N. P. Ry. Co. *supra*. Their decision and order are not predicated upon any "substantial evidence" but, to the contrary, their decision and order are against the evidence and their order is

therefore void. As the entry of a valid and enforceable order by the Commission is a jurisdictional prerequisite to the institution of a proceeding such as this in the District Court and, no such order having been entered, the Court was without jurisdiction and judgment should have been entered for defendant. "A void judgment is, in legal effect, no judgment—by it no rights are directed and from it no rights can be obtained * * *" (Freeman on Judgments 4th Edition, Section 117.)

PLAINTIFF FAILED TO ALLEGE OR PROVE DAMAGE.

In the specification of errors it will be found that exception is taken to the order of the court overruling the demurrer and to the action of the court in finding that plaintiff had shown that he had suffered injury and had been damaged by relying upon the recitals in the Commission's order awarding reparation, and as the same legal principles are involved these questions may best be considered together.

No evidence at all was introduced by complainant to show that it had sustained injury or suffered damage but, as has been stated, plaintiff relied entirely upon the recitals in the Commission's decision and order, plaintiff having failed to allege that he sustained damage and having failed to prove that any damages were actually sustained at the trial in the District Court, but endeavors to rely

solely and entirely upon the recitals contained in the Commission's decision and order. These recitals are contained in the last paragraph of the decision:

"We further find that complainant made the shipment in accordance with the above statement of facts and paid charges thereon at the rate herein found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount paid and the amount which it would have paid at a combination through rate of \$1.95 per 100 pounds, made up of \$1.30 to Sacramento, Cal. and 65 cents beyond, and that complainant is therefore entitled to an award of reparation against the Southern Pacific Company and Tonopah & Goldfield Railroad Company in the sum of \$447, with interest from November 25, 1910."

The order itself reads as follows:

"And it is further ordered, That said defendants Southern Pacific Company and Tonopah & Goldfield Railroad Company be, and they are hereby, authorized and directed to pay unto complainant, The Goldfield Consolidated Milling & Transportation Company, on or before July 1, 1913, the sum of \$447, with interest thereon at the rate of 6 per cent. per annum from November 25, 1910, as reparation on account of a rate charged for the transportation of a carload of steel window sash and parts from Youngstown, Ohio, to Goldfield, Nevada, which rate so charged has been found to have been unreasonable, as more fully and at large appears in and by said report of the Commission."

We make the unqualified statement that this is the only matter before the court with reference to the question of damages and that such proof is unsupported by any of the allegations of the complaint as is pointed out specifically by the demurrer which the court overruled, thereby committing reversible error.

Davis v. Mobile & O. R. Co., 194 Fed. 374
(CCA 5th Circuit)

Wherein the court held, in a case precisely in point:

“* * * But there is a significant absence of allegations showing that he (the plaintiff) paid the freight on the shipments or that it was paid by anyone for him and on his account.
* * *”

And the court held that the shipper having failed to allege that he paid the freight on the shipment made by him, or that it was paid by anyone for him or on his account, the complaint was demurrable. Not only must these facts be alleged but they must be proved by competent evidence and the recitals in the Commission's decision and order cannot supply this omission.

This matter has been definitely determined by the Supreme Court of the United States in the case of Pennsylvania Railroad Co. v. International Coal Mining Company, 230 U. S. 184, 200, 204. The Court held:

“On the civil side the Act provided for compensation—not punishment. Though the Act

has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons v. Chicago & N. W. Ry.*, 167 U. S. 447, 460, construing this section (8) 'before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury'. * * *

The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. And although the plaintiff insists that in all cases like this the fact and the amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record.

* * *"

This suit arose out of the unlawful payment of rebates and the plaintiff sued to recover from the railroad similar amounts on shipments made by it; whereas, in the case at bar, the plaintiff sues to recover the difference between a rate established by the carrier and a rate prescribed by the Commission. The principle involved, however, is identical and has been so recognized by the Interstate Commerce Commission in the recent decision of *New Orleans*

Board of Trade v. I. C. RR Co., 29 ICC 32, where, in a proceeding similar to the case at bar instituted for the sole purpose of recovering reparation, the Commission predicated its opinion upon the case last cited. For convenience we quote from the Commission's opinion:

"There is nothing in the act to regulate commerce from which a presumption of damage can be inferred and it has never been so held.

The wording of the act is as follows:

'Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons *injured* thereby for the full amount of *damages sustained in consequence of any such violation* of the provisions of this act.'

As said in Parsons v. C. & N. W. Ry. Co., 167 U. S., 447, 460, and quoted in Pa. R. R. Co. v. International Coal Co., 230 U. S., 200, in construing this section:

'Before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.'

And in Pa. R. R. Co. v. International Coal Co., *supra*, it is said:

'Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what,

though called damages, would really be a penalty, in addition to the penalty payable to the government.'

Proof of the damages resulting from the wrongful act of the carrier must be by such evidentiary facts as would be required to sustain such a recovery before a court of law. *Anadarko Cotton Oil Co. v. A., T. & S. F. Ry. Co.*, 20 I. C. C. 51.

Mere proof of specific shipments made and the freight paid and the amount for which reparation is sought does not make out a *prima facie* case. Something more is necessary. The complainant must show how the discrimination found to exist affected him to his damage. In other words, he must establish the *fact* of his damage as well as the *amount* of damages he claims."

This question, however, has been set definitely at rest by a decision rendered by the Circuit Court of Appeals for the Third Circuit in the case of *Lehigh Valley R. Co. v. Clark*, 207 Fed. 717. This case is precisely identical with the case at bar. In the *Lehigh Valley* case the Commission made a finding and ordered the railroads to make reparation, specifying the amount to be refunded in each case, and a certified copy of the report, conclusions and order of the Commission were attached as an exhibit to the complaint filed by the plaintiffs in the District Court and introduced in evidence. The plaintiffs in the *Lehigh* case adopted the same course as adopted by the plaintiff in the case at bar and relied upon the recitals in the Commission's decision and order

and offered no evidence to show that they had been injured or had suffered damages. Plaintiffs in that case likewise as plaintiff in the case at bar argued that the recitals made in the decision and order of the Commission made a *prima facie* case in support of their claim for damages, but the Circuit Court of Appeals very properly made the distinction between the weight and effect of the Commission's orders in cases where they had prescribed rates for the future and cases in which they had ordered the railroads to make reparation to the complainants. It is clearly pointed out by the court at page 721 that:

"It is as though Congress had enjoined as a duty the things embraced in such lawful order. It is in this view of a non-reparation case that the finding by the Commission of the reasonableness or unreasonableness of a rate is a finding of an ultimate fact, which will not be disturbed by a court of equity unless the legality of the proceeding in which it is made is successfully attacked."

But the court points out that:

"In such cases, the judicial power of a court of equity is invoked, to enforce, the *lawful* order of the Commission, and involves no controversy requiring a trial by jury. It is the *lawful* order, *qua* order, of the Commission, as an administrative body, that is to be enforced; whereas, in reparation cases, there is a controversy at common law as to whether the damages awarded by the Commission or any damages are recoverable, and the mere order of the

Commission, as we shall see, only figures in the case as a necessary condition precedent to the bringing of the action, though the findings of facts by the Commission, as set forth in its report, are *prima facie* evidence of the matters therein stated. The damages sought are only recoverable by the verdict of a jury and judgment thereon, as in ordinary trials at common law."

The court then goes on to show that by the Hepburn Amendment of 1906, the Commission is not required to make specific findings of fact in *non-reparation cases*, but that the Commission is bound to make findings of fact in reparation cases. The court also points out that a marked distinction is made between reparation and non-reparation cases by the provisions of Section 16. The court quotes from the Louisville & Nashville Case *supra*, where the Supreme Court held that in non-reparation cases the courts will not review the Commission's conclusions of fact, etc. in cases where a *court of equity* is asked to enjoin the enforcement of such an order except as to determine whether the Commission acted within its power, etc., and the Circuit Court of Appeals then adds:

"But it is clear that, *in a reparation case*, (italics ours) though the award of damages by the Commission, following its finding of fact that a given rate was unreasonable, may be proved as the basis or condition precedent to the institution of the suit for damages authorized by the statute, it is not capable of enforce-

ment as an administrative order, and is not of itself evidence of *liability, prima facie* or otherwise, in any judicial proceeding.

* * * * *

It hardly needs that attention be called to what is so obvious, that both the 'findings and order' are *prima facie* evidence only of the *facts* therein stated. This is very far indeed from declaring that the order itself, awarding reparation, is *prima facie* evidence of damages, or the proper measure thereof.

* * * * *

It makes redress of a private injury actually suffered, possible. It concerns the past and not the future conduct of the carrier, and, though this right of action for damages is qualified by making it depend in certain cases upon the precedent award of reparation by the Commission, such award is not of the nature of the administrative functions conferred on that body."

The court then establishes the legal principles, page 724, that a suit by one in whose favor Commission has made an award of damages by way of reparation is not a suit on the award but a plenary suit for damages actually incurred by the plaintiff, by reason of the violation of the act by the defendant as conclusively found by the Commission; that in the prosecution of such a suit plaintiff may avail himself, without further proof, of the conclusive *administrative* finding or order of the Commission that the defendant was guilty of a violation of the act "*but must prove the actual damages incurred by*

him by reason of such violation and for which damages alone the Act makes the defendant carrier liable."

It should be kept in mind that there was a specific order entered by the Commission predicated upon a finding that the plaintiffs were entitled to reparation on all shipments not barred by the statute of limitations, but the court held that: "Though these facts be taken by the jury as *prima facie* true, they clearly have no relevancy to the demand of the plaintiffs for damages. * * * It does not at all follow, as plaintiffs seem to be under the impression that it does, that because the Act makes certain findings of fact *prima facie* evidence of such facts, it also determines their probative force" and that "It is only as to the *facts* contained in the order, that the order is made *prima facie* evidence. But the orders themselves of the Commission are not *prima facie* evidence as to the question of liability in a judicial proceeding." (Pages 728-9)

The court cites the cases of *Pennsylvania R. Co. v. International Coal Mining Company* and the case of *Parsons v. Railway*, *supra*, in support of its decision and held that the plaintiffs could not recover.

The Circuit Court of Appeals again had this question under consideration in the case of *Lehigh Valley R. Co. v. Meeker*, 211 Fed. 785. In the proceeding before the Interstate Commerce Com-

mission the rates under consideration were alleged to be unreasonable and discriminatory and reparation was awarded upon the basis of the rates found to be reasonable and non-discriminatory. In the court below the plaintiff introduced in evidence the report and the order of the Commission and a supplemental report and order and, aside from the testimony of one witness as to the discrimination alleged to have been practiced by defendant, no other showing was made.

It was contended that the reports and orders of the Commission made out a *prima facie* case in favor of plaintiff but the Circuit Court of Appeals rejected that view of the law and, distinguishing between reparation and administrative orders, reached the conclusion that:

“The finding by the Commission that a given rate is unreasonable, while pertinent to the issue, in that it establishes a violation of the act, is not decisive of the question of liability for damages under section 8, in such a case as the present, either *prima facie* or otherwise.

The pertinency and evidential weight and value of the facts, as to which the findings and order are *prima facie* evidence, are for the determination of the court and jury, as in other civil cases. They may or may not make out a *prima facie* case for the plaintiff.”

The court below, in its charge to the jury, stated that the report and findings of the Commission finding the rates unreasonable and discriminatory and

awarding damages was prima facie evidence of defendant's liability and conclusive upon him unless he offered testimony in rebuttal. In holding this construction of the statute erroneous the court said:

“In this, we think the court was clearly in error. The statute, in conformity with the constitutional requirement, has provided that the defendant can only be mulcted in damages by the verdict of a jury rendered in a suit, as at common law, proceeded in “in all respects like other civil suits for damages.” The statute says that such facts as are stated in the findings or order of the Commission need not be proved in the suit for damages, but that such findings or order shall be prima facie evidence of the same, for whatever they may be worth. In other words, the statute makes the finding or order prima facie evidence of certain facts, but it does not make, or attempt to make, such facts prima facie evidence of anything.”

Plaintiff contended, as here, that the measure of damages was the difference between the unreasonable rate paid and the rate found by the Commission to be reasonable and that upon proof of the amount paid and what the reasonable charge should have been, he was entitled, as a matter of law, to recover the difference between the two rates. After quoting from the opinion of the Supreme Court in the *International Coal Mining Company*, supra, the court goes on to say:

“This statement of the Supreme Court is general, and is applicable to any and all cases

where damages are sought by one claiming to have been injured by a violation of the act. It would seem to dispose of the contention of the defendants in error, referred to above and approved by the court below, that 'the shipper was entitled as matter of law to recover the difference between the two rates,' that is, the tariff rate charged to the shipper, and the lower rate found to be reasonable by the Commission. Herein is the essential vice of defendant in error's argument, that the fact and amount of pecuniary loss in a case like the present, is *matter of law*, and *not of fact* to be determined by the jury. It does not help the matter that the defendants in error argue that the rate charged having been conclusively found by the Commission as unreasonable, the award of the difference between that rate and the rate found to be reasonable is only *prima facie* evidence of the liability of defendant for the amount so awarded. The act makes nothing *prima facie* evidence of the liability created by section 8. The *prima facies* mentioned in section 16 is attached to the *facts* stated in the finding and order of the Commission, which facts may or may not be sufficient to establish that liability.

* * * * *

If the intent of the legislative mind had been to go further and make, not only the findings of fact and order *prima facie* evidence of the facts stated, but also the conclusions of the Commission *on facts*, *prima facie* evidence of the *liability* of the defendant for the amount of damages stated in the award, such intent

should and would have found expression in the act. We are not to impute to Congress such an intention so violative of the fundamental rights of the parties to a suit at common law, and of the express guaranty of the Constitution in that regard. If more were wanted, we might refer to the language of section 14, which emphasizes the distinction between the 'conclusions' of the Commission and 'the findings of fact on which the award is made.'

The distinction between reparation and non-reparation cases, so anxiously made by Congress, in order to conform to the spirit of the seventh amendment, would be practically nullified, if, in prosecuting a suit for damages actually sustained by reason of a violation of the law, the liability for such damages, and the amount thereof, as found by the Commission, must be conceded in the first instance. Is a defendant to be called upon, practically to prove a negative, and show that the plaintiff was not damaged, or that the amount claimed was less than that stated by the Commission? These facts, or the facts upon which they depend, are all peculiarly within the knowledge of the plaintiff, and it is fundamental that neither party to a suit should be required to prove or disprove what is peculiarly within the knowledge of the opposite party."

It was pointed out that if plaintiff's theory were correct a suit of this nature is brought not to recover the damages he may have sustained but in reality it is instituted to collect a penalty as in such a case the Commission's findings would be con-

clusive upon the defendant. This theory was held untenable and because of the errors committed by the lower court the judgment was reversed and a venire de novo awarded.

As has been pointed out, the decisions are uniform in sustaining these legal principles. They have found favor with the Supreme Court of the United States in its recent decisions. They have been applied by the Circuit Court of Appeals in the Lehigh Valley case to facts identical with the facts in the case at bar and it must be held that these decisions place a proper construction upon the Interstate Commerce Act, in fact, the only construction which can be placed upon the act, and that therefore the learned trial judge erred in overruling the demurrer and in holding that plaintiffs had made a case by reliance upon the recitals contained in the Commission's decision and order.

It is respectfully submitted that the judgment should be reversed.

HUGH H. BROWN

C. W. DURBROW

Attorneys for Plaintiffs in Error.

WM. F. HERRIN

Of Counsel.

No. 2467

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY (a corporation),
and TONOPAH & GOLDFIELD RAILROAD COM-
PANY (a corporation),

Plaintiffs in Error,

VS.

GOLDFIELD CONSOLIDATED MILLING & TRANS-
PORTATION COMPANY (a corporation),

Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

BROWN & BAER,

Attorneys for Defendant in Error.

CHARLES L. BROWN,
Of Counsel.

Filed this _____ day of November, 1914.

FRANK D. MONCKTON, Clerk.

By _____ Deputy Clerk.

No. 2467

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Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

ADDITIONAL STATEMENT OF FACTS.

In addition to the statement of the case as set forth in the brief on behalf of plaintiffs in error, the defendant in error further states, that in addition to finding the rate in question to be an unreasonable one, the Commission further found that the Goldfield Consolidated Milling & Transportation Company was entitled to an award of reparation against the Southern Pacific Company and

the Tonopah & Goldfield Railroad Company in the sum of four hundred and forty-seven (\$447) dollars, with interest from November 25, 1910, and directed said railroad companies to pay to the said Goldfield Consolidated Milling & Transportation Company on or before July 1, 1913, said sum of four hundred and forty-seven (\$447) dollars, with interest thereon at the rate of six (6%) per cent per annum from November 25, 1910, on the ground that said sum was the excess over and above the rate which the Commission found to be reasonable.

Demand was duly made upon the carriers for the payment of said sum of four hundred and forty-seven (\$447) dollars with interest and said demand was refused and thereupon and thereafter and on the 11th day of October, 1913, this proceeding was instituted in the United States District Court for the recovery of said order of reparation as provided by Section 16 of the Interstate Commerce Act.

THE LAW OF THE CASE.

The jurisdictional question suggested in the brief of plaintiffs in error is one upon which the law may be said to be well settled.

In the case of *Cincinnati, H., & D. R. Co. v. Interstate Commerce Commission*, 206 U. S. 142, the Court uses the following language pertinent to the question here presented:

“The statute gives prima facie effect to the findings of the Commission, and, when those findings are concurred in by the circuit court, we think they should not be interfered with unless the record establishes that clear and unmistakable error has been committed. See *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 194, 40 L. ed. 935, 938, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 672, 44 L. ed. 309, 318, 20 Sup. Ct. Rep. 209.

In like manner the same Court has again reviewed this question in *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 541-6, and from the syllabi of this case the following statements are pertinent:

1. The courts will not examine the facts on which the Interstate Commerce Commission based its order reducing rates further than to determine whether there was substantial evidence to sustain the order.

2. An order of the Interstate Commerce Commission reducing rates cannot be said to have been made without substantial evidence to support it, where, although there is no direct testimony that the old rate was unreasonably high, there were facts in evidence from which experts could have named a rate.

5. The Interstate Commerce Commission cannot be said to have ordered a reduction in the rates on lumber because of the effect upon the lumber industry of the carriers' action in advancing the rates, where, although the Commission considered that subject, its opinion, taken as a whole, affirmatively shows that it confined itself to the exercise of its statutory

power to condemn unjust and unreasonable rates and fix reasonable ones.

From the body of the opinion in the above case, after the Court has stated the six propositions bearing upon the question of jurisdiction as suggested on pages 5 and 6 of the opening brief on behalf of plaintiffs in error, and continuing the opinion the Court says:

“In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. ‘The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience,’ *Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere *scientilla* of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.”

Let us therefore turn to the record of this case as set forth in the transcript for the purpose of determining whether or not there was substantial evidence to sustain the order of the Commission and also the judgment of the trial Court.

Upon the trial below there was introduced in evidence the opinion of the Commission (see pages 40, 41, 42, and 43 of Transcript), and also the order of the Commission (see pages 43, 44 and 45 of Transcript).

The opinion and order of the Commission are under the Commerce Act made *prima facie* evidence of all of the statements therein contained, and when these documents were introduced in evidence in the Court below they constituted, in our judgment, a *prima facie* case. The plaintiff, however, did not rest upon the establishment of its *prima facie* case, but proceeded further and introduced in evidence a statement of the bill of the shipment in question (see page 46 of Transcript), and also a comparative statement of commodity rates on iron or steel window sash from which the discrimination against Goldfield, Nevada, was made apparent (see page 48 of Transcript), and from which, no doubt, the Commission reached its conclusion that the rate under attack was unreasonable.

There was also introduced in evidence a statement showing that steel window sash and wooden window sash as freight were classified identically in certain classification districts of the United States, and, in fact, the entire United States except Pacific Coast Territory (see page 49, Transcript), and from this Exhibit the Commission was justified in its conclusion that the rate under attack was unreasonable, arising also from the wrongful classification in the Pacific Coast Territory.

Again there was also introduced in evidence a typewritten statement of the case (see pages 50, 51 and 52 of Transcript) fully stating the position of the claimants in its attack upon the unreasonableness of the rate in question and giving the various tariff references and per cent per ton per mile earnings to further aid the Commission in arriving at its conclusion that the rate under attack was an unreasonable one.

All of these documents were again introduced in evidence and presented to the trial Court upon the hearing of this question in that tribunal and in addition there was also introduced in evidence the transcript of the testimony of the trial before the Commission.

From all of this evidence the defendant in error asserts that there was sufficient evidence before the Commission to justify and support the findings and opinion of the Commission and in like manner the findings and opinion of the trial Court upon which its judgment rests and we submit that from the facts in evidence experts could have named a reasonable rate, as did the Commission, and in like manner, experts could have found the rate under attack to have been unreasonable, as did the Commission.

The plaintiffs in error except to the order of the Court overruling their demurrer to the complaint in the lower Court and they again except to the conclusions and judgment of the Court, and these points are considered together under the charge that the plaintiff failed to allege or prove damage.

The defendant in error asserts that there was full and complete allegation of damage and also full and complete proof of damage, both before the Commission and before the trial Court. In support of this assertion the allegation of damage is fully set forth in paragraphs IV, V and VI of the complaint and as a copy of the findings and order of the Commission are referred to in paragraph V of the complaint and duly attached thereto under mark of Exhibit "A", we submit that the same should be read in connection with the allegations of the complaint, and we therefore find the allegation

"That complainant has been damaged to the extent of the difference between the amount paid and the amount which it would have paid at a combination through rate of \$1.95 per hundred pounds, made up of \$1.30 to Sacramento, Cal., and 65¢ beyond, and that complainant is therefore entitled to an award of reparation against the Southern Pacific Company and Tonopah & Goldfield Railroad Company in the sum of \$447.00 with interest from November 25, 1910."

We therefore submit that the demurrer was properly overruled by the trial Court.

As these matters were again proven upon the trial of the case and established by the evidence as heretofore shown by the introduction of the order and decision of the Commission and by the introduction of the transcript of the proceedings before the Commission, together with all of the exhibits introduced before and received by the Commission, we submit that the proof is ample and complete that there was

damage suffered by the plaintiff below as a result of the unreasonable charges made by the carriers and the exaction of the same by the carriers from the plaintiff below as an unreasonable freight charge upon its steel window sash after the haul had been made. We suggest that all that is necessary is to now call the attention of this Court to the fact that the finding upon this point is made in favor of the plaintiff below by the trial Court, and when it is shown that there was evidence for such finding and the judgment of the Court that this Court should not disturb such finding and judgment, but should allow it to remain as a settled question of fact in the case.

This brings us to the case of *Illinois Central Railroad Company etc. v. Interstate Commerce Commission*, 206 U. S. 441, and quoting from the last paragraph of the able opinion the language of the Court is much in point here.

“It is true, appellants assert, that clear and unmistakable error has been committed, but upon ground untenable, as we have seen. And the present case, above all others, calls for the application of the rule. The question submitted to the Commission, as we have said, with tiresome repetition, perhaps, was one which turned on matters of fact. In that question, of course, there were elements of law, but we cannot see that any one of these or any circumstances probative of the conclusion was overlooked or disregarded. The testimony was voluminous. It is not denied that it was conflicting, and, by concession of counsel, it included a large amount of testimony taken on behalf of appellants in support of the propositions contended

for by them. Whether the Commission gave too much weight to some parts of it and too little weight to other parts of it is a question of fact, and not of law. It seems from the findings, report, and conclusions of the Commission that it considered every circumstance pertinent to the problem before it.

Further testimony was taken by the circuit court and its judgment confirmed that of the Commission and approved its order. Decree affirmed."

Having fully answered the points suggested by the plaintiffs in error in their opening brief, and having cited the cases containing the law which in our judgment determines this case, the defendant in error respectfully submits that the judgment of the lower Court should be affirmed.

Dated, San Francisco,

November 9, 1914.

BROWN & BAER,

Attorneys for Defendant in Error.

CHARLES L. BROWN,

Of Counsel.

United States Circuit Court of Appeals---Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation, and TONOPAH & GOLDFIELD RAILROAD COMPANY, a corporation,
Plaintiffs in Error,

vs.

GOLDFIELD CONSOLIDATED MILLING AND TRANSPORTATION COMPANY, a corporation,
Defendant in Error.

Petition for Rehearing

HUGH H. BROWN,
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Filed

FEB 27 1915

F. D. Monckton,

Filed this.....day of February, 1915.

FRANK D. MONCKTON, *Clerk.*

By....., *Deputy Clerk.*

No. 2467.

**United States Circuit Court of Appeals
Ninth Circuit**

SOUTHERN PACIFIC COMPANY, a corporation,
and TONOPAH & GOLDFIELD
RAILROAD COMPANY, a corporation,

Plaintiffs in Error,

vs.

GOLDFIELD CONSOLIDATED MILL-
ING AND TRANSPORTATION COM-
PANY, a corporation,

Defendant in Error.

PETITION FOR REHEARING

To the Honorable,

The Circuit Court of Appeals of the

United States, for the Ninth Circuit.

Plaintiffs in error respectfully petition for a rehearing of the decision rendered by this honorable Court in the above entitled cause, upon the ground that the decision rendered by this Court in the above-entitled cause, affirming the judgment of the District Court, is in contravention of the Sev-

enth Amendment to the Constitution of the United States, and deprives plaintiffs in error of the rights guaranteed to them by said Seventh Amendment, in that it requires plaintiffs in error to pay unto defendant in error the sum awarded by the judgment of the District Court as "damages," in the absence of any evidence whatever introduced before the Interstate Commerce Commission or before the District Court, showing that defendant in error has sustained or suffered any damage whatsoever.

ARGUMENT

The sole question presented to this Court for determination is whether the opinion, report and order of the Interstate Commerce Commission are entitled to any evidentiary value.

It is respectfully submitted that the judgment of the Circuit Court of Appeals, when reduced to its final analysis, gives to the Commission's decision and order the value of a judgment of a judicial tribunal. The statute does not contemplate that decisions and orders of the Commission shall have this effect, and it is respectfully represented that if such an interpretation can be placed upon the Act it must be held to be unconstitutional, because the statute would have conferred upon one tribunal legislative as well as judicial power, in contravention of the express provisions of the federal constitution.

The Supreme Court of the United States has held that the power conferred upon the Interstate

Commerce Commission by the statute is legislative and not judicial. (*Prentiss vs. Atlantic Coast Line Railway*, 211 U. S. 210, 226.)

Complainants in cases such as this must bring their complaints before the Interstate Commerce Commission and obtain an order holding that the rates complained of are unreasonable, merely as a jurisdictional prerequisite, which will enable them to bring an action such as the case at bar, to determine whether they are entitled to an award of damages by way of reparation.

Abilene Cotton Oil Co. vs. Railroad, 204 U. S. 426;

Robinson vs. B. & O. R. Co., 222 U. S. 506, 511;

Lehigh Valley R. Co. vs. Clark, 207 Fed. 717.

OF
QUESTION ~~THE~~ DAMAGES MUST BE JUDICIALLY
DETERMINED

In proceedings involving the question of reparation, carriers are entitled to a *judicial* determination of the questions necessarily involved in such proceedings.

“If the law be such as to make a decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such law to be unconstitutional.”

Ex parte Young, 209 U. S. 123, citing *Chicago etc. R. Co. vs. Minnesota*, 134 U. S. 416.

“The legislature may determine what private property is needed for public purposes. That is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial.
* * * (*Monongahela Navigation Co. vs. U. S.*,

148 U. S. 312, 327).

And the Supreme Court held that:

“The same principle applies when vested rights of property are disturbed by the legislative enactment in respect to rates.”

Chicago Milwaukee & St. Paul R. Co. vs. Tompkins, 176 U. S. 173.

**THE COMMISSION'S DECISION AND ORDER HAVE NO
EVIDENTIARY VALUE**

THE COMMISSION MADE NO FINDINGS OF FACT

Section 14 of the Interstate Commerce Act, as amended June 26, 1906, expressly provides that “In case damages are awarded, such report shall include the findings of fact on which the award is made.”

The Commission made no findings of fact in the case at bar, and therefore its mere *conclusion* “that complainant has been damaged to the extent of the difference between the amount paid and the amount which it would have paid at the combination through rate,” etc., is not a compliance with the statute.

It has been held by the Circuit Court of Appeals for the Third Circuit, in the Lehigh Valley Case, that "The imperative command of Section 14, that in case damages are awarded such report shall include the *findings of fact on which the ruling is made*, evidently contemplated a distinct enumeration of such findings by the Commission, with reference to their proposed use in a jury trial."

In the absence of specific findings of fact by the Commission, as required by the express provisions of Section 14, the order of the Commission is not entitled to any evidentiary value.

THE COMMISSION'S ORDER IS UNSUPPORTED BY ANY EVIDENCE

Irrespective of whether the conclusion of the Commission that "complainant had been damaged" may be considered as a "*finding of fact*," the Commission's decision and order and its conclusions are wholly unsupported by any evidence of any kind, character or description. The transcript may be searched in vain for one word of evidence showing that the defendant in error sustained any damage.

It is the duty of this Court, in a proceeding such as this, to inquire into and determine this question, which is one of the fundamental issues framed by the pleadings;

Louisville & Nashville R. Co. vs. I. C. C.,
227 U. S. 88, 92;

I. C. C. vs. Union Pacific R. Co., 222 U. S.
541, 547;

I. C. C. vs. Illinois Central R. Co., 215 U. S.
452, 470;

but neither the trial Court nor this Court has given any consideration to this fundamental question.

Even in cases where the Commission may enter an order determining the reasonableness of rates, the decision and order must be predicated upon substantial evidence actually introduced before the Commission.

Louisville & Nashville R. Co. vs. I. C. C., supra.

A fortiori the same rule should be applied in cases involving questions of reparation.

The character of evidence that must be adduced in order to support a finding and order of reparation is fully disclosed by the Commission's own decisions.

In deciding the case of *New Orleans Board of Trade vs. Illinois Central R. Co.*, the Commission held that:

“Mere proof of specific shipments made, and the freight paid, and the amount for which reparation is sought, does not make out a *prima facie* case. *Something more is necessary.* The complainant must show how the discrimination found to exist affected him to his damage; in other words, he must *establish the fact* of his damage as well as the amount of his damage he claims.”

29 I. C. C. 32, 33, 34.

The Commission affirmed this ruling in the case of *Spiegle vs. Southern Railway Co.*, decided January 19, 1915:

“Since our former opinions were promulgated the United States Supreme Court in *International Coal Co. vs. Pennsylvania R. Co.*, 230 U. S. 200, has held that before an award of reparation can be made on account of undue discrimination or preference on the part of carriers subject to the Act, the complainant must prove that he was actually damaged by reason of such undue discrimination or preference, and furthermore must prove the amount of such damages.

Mere proof of particular shipments made and of the freight paid does not make out a prima facie case. *New Orleans Board of Trade vs. I. C. R. Co.*, 29 I. C. C. 32.”

In the case of *International Coal Mining Co.*, cited by the Commission in their last quoted decision, the Supreme Court of the United States holds that:

“Before any party can recover under the act he must show not merely the wrong of the carriers, but that that wrong has in fact operated to his injury. * * * * *The statute gives the right of action for damages to the injured party*, and by the use of these legal terms clearly indicated that the damages recoverable

were those known to the law and intended as compensation for the injury sustained. * * * *
 And although the plaintiff insists that in all cases like this the fact and the amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the Act." * * * *

It is respectfully submitted that this Court should review the transcript of proceedings before the Interstate Commerce Commission which were introduced in evidence by the plaintiffs in error at the trial, and if the unqualified statement *that there is not one syllable of testimony relating to the fact that defendants in error have sustained any damage*, is borne out by the transcript, this Court should grant a rehearing of this case and reverse the judgment of the trial Court, upon the ground that the Commission, in rendering its decision and order relating to reparation, has undertaken to exercise a power which has not been conferred upon it, and that its order is void.

In deciding the questions on appeal this Court did not pass upon this fundamental question. The Court, in deciding the case, held that there was no proof offered to the trial Court relating to the damage, with the exception of the "findings (?), conclusions, and order of the Interstate Commerce Commission." (Decision, pages 2 and 3.)

It therefore appears that, even though the Commission's conclusions can be dignified by considering them findings, these "findings" are wholly and entirely unsupported by evidence, and therefore there was no *finding of fact* of the Commission before the Court, upon which the Court could find that defendant in error had been damaged.

No "evidence" was introduced before the trial Court to prove damage. The judgment of the trial Court is contrary to law, not only because there were no findings of fact made by the Commission, and because the order entered by the Commission was wholly unsupported by the evidence, but also because the order of the Commission is not entitled to any evidentiary value.

In the case of *Lehigh Valley Railroad Co. vs. Clark*, 207 Fed. 717, 721, the Circuit Court of Appeals says:

"In reparation cases there is a controversy at common law as to whether the damages awarded by the Commission, or any damages, are recoverable; and the *mere order of the Commission* * * * only figures in the case as a necessary condition precedent to the bringing of the action, though the *findings of facts* by the Commission, as set forth in its report, are *prima facie* evidence of the matters therein stated. *The damages sought are only recoverable by the verdict of a jury and judgment*

thereon, as in ordinary trials at common law."
 (Italics here, as elsewhere, ours.)

The Court announces clearly that:

"In a reparation case, though the award of damages by the Commission, following its *findings of fact* that a given rate was unreasonable, may be proved as the basis or condition precedent to the institution of the suit for damages authorized by the statute, it is not capable of enforcement as an administrative order, and is *not of itself evidence of liability, prima facie or otherwise, in any judicial proceeding.* * * *

It hardly needs that attention be called to what is so obvious, that both the 'findings and order' are prima facie evidence only of the *facts* therein stated. This is very far indeed from declaring that the order itself, awarding reparation, is prima facie evidence of damages, or the proper measure thereof."

This Court concedes in its opinion that it was incumbent upon the defendant in error to prove its damage, but differentiates the case at bar from the case of *Lehigh Valley vs. Meeker, supra*, by reason of the fact that the Commission, in rendering its decision in the Lehigh Valley case, concluded that the complainant was "entitled to reparation" on all shipments, whereas in the case at bar the Commission reaches the conclusion that the defendant in error was "damaged to the extent of the differ-

ence between the amount paid and the amount which it would have paid at combination of the through rate * * * in the sum of \$447 * * *"

The situation in the case at bar is identical with that in the case of *Lehigh Valley R. Co. vs. Meeker*, 211 Fed. 785, as is shown by the language employed by the Circuit Court of Appeals at page 797:

"As to these documents thus admitted in evidence, it is apparent that the requirement of Section 14, that 'in case damages are awarded, such report shall include the findings of fact on which the award is made,' has not been complied with by any express findings of fact in the supplemental report of May 7, 1912, in which the award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report; and that in the said original report *there are no findings of fact, as such*, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions, and conclusions of the Commission, all of which were irrelevant to an award of actual pecuniary damage."

Here, as in the Meeker case, *the report contains no findings of fact.*

It is respectfully submitted that a rehearing should be granted, upon the ground, to use the language of the Circuit Court of Appeals, that:

“There were no sufficient findings of fact in these reports of the Commission, as required by the statute; second, that if any of the statements in that * * * report could properly be considered as findings of fact within the meaning of the statute, so as to make such findings prima facie evidence of the facts found, they were not sufficient to support the plaintiff's claim, or to make out even a prima facie case for damages.”

To hold that the statements made by the Commission in its decision and order have any evidentiary value is to deny plaintiffs in error the rights guaranteed to them by the Seventh Amendment to the Constitution of the United States, and as was said by the Circuit Court of Appeals for the Third Circuit:

“The distinction between reparation and non-reparation cases, so anxiously made by Congress, in order to conform to the spirit of the seventh amendment, would be practically nullified if, in prosecuting a suit for damages actually sustained by reason of a violation of the law, the liability for such damages, and the amount thereof, as found by the Commission, must be conceded in the first instance.”

Lehigh Valley R. Co. vs. Meeker, 211 Fed. 785, 808.

The Court further held that the defendants in cases such as this should not be called upon "practically to prove a negative and show that plaintiff was not damaged, or that the amount claimed was less than that stated by the Commission," because "these facts, or the facts upon which they depend, are all peculiarly within the knowledge of the plaintiff, and it is fundamental that neither party to a suit should be required to prove or disprove what is peculiarly within the knowledge of the opposite party." (*Lehigh Valley vs. Meeker, supra*, page 808.)

The principles involved in the case at bar are identical with the principles involved in the Meeker and Clark cases, *supra*, and the rules there announced are supported by the decision rendered by the Supreme Court of the United States in the case of *Pennsylvania Railroad Co. vs. International Coal Mining Co.*, 230 U. S. 184, 200. It is therefore respectfully submitted that plaintiffs in error are entitled to a rehearing, and they respectfully petition that they be permitted to present the matter further to the Court by way of oral argument.

Respectfully submitted,

HUGH H. BROWN,
FRANK B. AUSTIN,
C. W. DURBROW,

Attorneys for Plaintiffs in Error.

WM. F. HERRIN,
Of Counsel.

We hereby certify that the foregoing petition for rehearing is, in our judgment, well founded in point of law and the same is not interposed for delay.

Dated, February.....*22nd*....., 1915.

.....*Hugh H. Brown*.....

Frank B. Austin

.....

C. W. Durbrow

.....

*Attorneys for
Petitioner and Plaintiff in Error.*

No. 2470

United States
Circuit Court of Appeals
For the Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District Court
for the Eastern District of Washington,
Northern Division.

Filed

SEP 1 - 1914

F. D. Monckton,
Clerk.

No. _____

United States
Circuit Court of Appeals
For the Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record

**Upon Writ of Error to the United States District Court
for the Eastern District of Washington,
Northern Division.**

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Names and Addresses of Attorneys of Record

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HAMBLEN & GILBERT, Paulsen Building, Spokane, Washington,

Attorneys for Plaintiff in Error.

FRANCIS A. GARRECHT, U. S. Attorney, Federal Building, Spokane, Washington, and

OTIS B. KENT, Special Assistant United States Attorney, Washington, D. C.,

Attorneys for Defendant in Error.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

v's.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Complaint

Now comes the United States of America, by Oscar Cain, United States Attorney for the Eastern District of Washington, and brings this action on behalf of the United States against the Oregon-

Washington Railroad & Navigation Company, a corporation organized and doing business under the laws of the state of Oregon, and having an office and place of business at Wallula, in the state of Washington; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 21, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one

continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A SECOND CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 22, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A THIRD CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 23, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M.,

on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A FOURTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415,) defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 24, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for

a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A FIFTH CAUSE OF ACTION,

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415,) defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 25, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its

certain telegraph operator and employee, to-wit M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A SIXTH CAUSE OF ACTION,

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 26, 1913, at its office and station

at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A SEVENTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-

four hour period beginning at the hour of 7:00 o'clock A. M., on April 27, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR AN EIGHTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon."

approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 28, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A NINTH CAUSE OF ACTION, plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the

safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 29th, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

FOR A TENTH CAUSE OF ACTION,

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four hour period beginning at the hour of 7:00 o'clock A. M., on April 30th, 1913, at its office and station at Wallula, in the State of Washington, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: M. W. Longabaugh, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to-wit: from said hour of 7:00 o'clock A. M., on said date, to the hour of 12:00 o'clock m'night on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received, and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of violation of said Act of Congress, defendant is liable to plaintiff in the sum of Five Hundred Dollars.

WHEREFORE plaintiff prays for judgment against the defendant in the sum of five thousand dollars and its costs herein expended.

(Signed) OSCAR CAIN,
United States Attorney.

Endorsements: Complaint.

Filed in the U. S. District Court for the Eastern District of Washington, August 4, 1913.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

v.s.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant,

Answer

Now comes the Oregon-Washington Railroad & Navigation Company, by its attorneys, and for its answer to the complaint of the plaintiff herein, admits, denies and alleges as follows:

Denies each and every allegation contained in the plaintiff's first to tenth causes of action inclusive, and every part and parcel thereof, except that defendant admits that one M. W. Longabaugh did work at Wallula, Washington, from the hour of 7 o'clock a. m., to the hour of 12 o'clock midnight, on each of the days from April 21, 1913, to April 30, 1913, both days inclusive, and further excepting as hereinafter alleged.

Defendant for a further and separate answer to each of said ten causes of action, alleges:

I.

That the defendant is a corporation organized under the laws of the State of Oregon, and was, during all the times and dates in the complaint mentioned, a common carrier, engaged in interstate commerce by railroad in the state of Washington.

II.

M. W. Longabaugh, during the dates and time mentioned in the complaint, was employed by the defendant as station agent at the station of Wallula, in the state of Washington.

During said dates from April 21 to April 30, 1913, both days inclusive, it became necessary for the defendant, and for good cause, to discharge one of its telegraph operators and employees, with the result that the defendant had only two telegraph operators for the performance of the duties of telegraphing at said station during said time; that the defendant inquired at various places likely to enable it to obtain an additional operator, to-wit: at Portland, Ore., The Dalles, Pendleton, La Grande, Walla Walla, Spokane, and elsewhere, but was unable to secure the services of an operator during said time, and did thereupon direct the said M. W. Longabaugh to work three hours as a station agent, and six hours as a telegraph operator, making a total period of nine hours in each twenty-four hour period, but that the said M. W. Longabaugh, without the knowledge of the defendant or any of its officers or agents, and against its will and consent, did erroneously construe said directions as to his work, and did work twelve hours as a station agent and six hours as an operator, making a total

of eighteen hours in each 24-hour period, and did so continue to work from the 21st day of April, 1913, to the 30th day of April, 1913, at which time the fact of the service of the said Longabaugh was discovered by and became known to the defendant, at which time said work of the said Longabaugh immediately ceased, and was caused to be discontinued by the direct action of the defendant and its officers and agents, and that in no instance did this defendant or any of its officers or agents require or permit with its knowledge or consent, the said Longabaugh to perform any service as a telegraph operator for a longer period than six hours in any 24-hour period between said dates or any other time.

WHEREFORE, defendant prays that plaintiff take nothing by its complaint; that the same be dismissed, and the defendant allowed to go hence without day.

(Signed) W. W. COTTON,

(Signed) A. C. SPENCER,

(Signed) HAMBLÉN & GILBERT,

(Signed) O. E. COCHRAN,

Attorneys for Defendant.

State of Oregon, County of Multnomah,—ss.

A. C. Spencer, being first duly sworn, deposes and says: That he is general attorney for the Oregon-Washington Railroad & Navigation Company, corporation defendant above named; that he has read the foregoing answer, knows the contents thereof, and that the same is true as he verily believes.

(Signed) A. C. SPENCER.

Subscribed and sworn to before me this 19th day of August, 1913.

(Signed) C. E. COCHRAN,

Notary Public for Oregon.

Endorsements: Service by copy admitted at Spokane, Wn., Aug. 21, 1913.

(Signed) OSCAR CHAIN,

Attorney for Plaintiff.

Answer.

Filed in the U. S. District Court for the Eastern District of Washington, August 21, 1913.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant,

Stipulation

IT IS HEREBY STIPULATED, that the Oregon-Washington Railroad & Navigation Company, is and was during the time hereinafter specified, a common carrier by railroad, incorporated, organized, existing and doing business under the laws of the State of Oregon, and having an office and place of business at Wallula, in the State of Washington, and within

the jurisdiction of this court; and that it is and was during said time engaged in interstate commerce;

That on April 21, 1913, and on each of the nine succeeding days thereafter, to and including April 30, 1913, a certain employee of the said defendant, to-wit: M. W. Longabaugh, was and remained on duty as the agent of the said defendant at the said Wallula, from 7:00 A. M. to 7:00 P. M., on each of said dates, and thereafter remained on duty as a telegraph operator at the said Wallula, a continuously operated day-and-night office or station of the said defendant from 7:00 P. M. to 12 o'clock midnight, on each of said dates; and that the said M. W. Longabaugh was then and there engaged in the handling of orders pertaining to or affecting the movement of trains engaged in interstate commerce; that on said 21st day of April, 1913, and before he had performed any excess service, the said Longabaugh was instructed by his superior officer, not to work in excess of nine hours in any twenty-four hour period, either as agent or operator or in both capacities; that the said Longabaugh remained on duty longer than ~~twenty-four~~ ^{twenty} hours as aforesaid in violation of said instructions, and without the actual knowledge of the superior officers of said Longabaugh.

Dated at Spokane, Washington, this 20th day of April, 1914.

(Signed) FRANCIS A. GARRECHT,

By O. B. KENT, Special Asst. U. S. Attorney,

Attorneys for Plaintiff.

(Signed) HAMBLEN & GILBERT,

Attorneys for Defendant.

Endorsements: Stipulation.

Filed in the U. S. District Court for the Eastern
District of Washington, April 20, 1914.

W. H. HARE, Clerk.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No.-----

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant,

Stipulation Waiving Jury

It is hereby stipulated and agreed between the
above named parties that the above-entitled cause may
be submitted to the court, and the trial of said cause
by jury is hereby expressly waived.

(Signed) A. C. SPENCER and
HAMBLÉN & GILBERT,
Attorneys for Defendant.

(Signed) FRANCIS A. GARRECHT and
OTIS B. KENT,
Attorneys for Plaintiff.

Endorsements: Stipulation Waiving Jury.

Filed in the U. S. District Court for the Eastern
District of Washington, April 20, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*
No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

v.s.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant,

Opinion

FRANCIS A. GARRECHT, U. S. Atty., and
OTIS B. KENT, Spec. Asst. to U. S. Atty., for
Plaintiff.

HAMBLEN & GILBERT, for defendant.

RUDKIN, District Judge.

This is an action to recover penalties for violation of the Act of Congress of March 4, 1907, entitled, "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," (34 Stat., 1415) commonly known as, "The Hours of Service Act." The complaint contains ten counts or causes of action in all, the first based on excessive hours of service by an employee named Longabaugh on the 21st day of April, 1913, and the remaining nine on excessive hours of service by the same employee on the nine succeeding days. When the case was called for trial a jury was impaneled and sworn, but the parties thereafter agreed upon the facts and the jury was discharged by consent and the cause submitted to the court on a written stipulation. From this stipu-

lation it appears that the defendant corporation is a common carrier by railroad engaged in interstate commerce; that Wallula, an office on its line of railway, is a station continuously operated night and day; that on the 21st day of April, 1913, and on each of the nine succeeding days the employee Longabaugh went on duty as agent at that place at the hour of seven o'clock A. M. and remained on duty continuously as such agent until the hour of seven o'clock, P. M. and thereafter remained on duty continuously as a telegraph operator and, by use of the telegraph, dispatched, reported, transmitted, received and delivered orders pertaining to or affecting train movements until the hour of twelve o'clock midnight; that before the employee Longabaugh had performed any excessive hours of service he was instructed by his superior officer not to work in excess of nine hours in any twenty-four hour period, either as agent or operator or in both capacities, and that he remained on duty for a longer period than nine successive hours in violation of such instructions and without the actual knowledge of his superior officers. The sole question presented for decision, therefore, is, did the instructions to the employee not to violate the law, or want of knowledge of a violation of the law on the part of his superior officers constitute a defense.

It is now well settled that the Safety Appliance Act and kindred statutes impose positive and absolute duties on carriers the non-performance of which is not excused by the exercise of reasonable diligence

or due care on their part, and the Hours of Service Act admits of no other rational construction.

St. Louis & Iron Mountain Railway v. Taylor,
210 U. S., 281.

C. B. & Q. Railway v. United States, 220
U. S., 559.

Dclk v. St. Louis & San Francisco R. R.,
220 U. S., 580.

It is urged that the words "require or permit" imply consent or knowledge on the part of the employer, and this is perhaps their common significance, but the word "permit" also means a failure to prohibit by one who has the power and authority to do so, and in my opinion the term is here used in the latter sense.

In *United States v. San Francisco Bridge Company*, 88 Federal 891, cited by the defendant, section 2 of the Act under consideration expressly provided:

"That any officer or agent of the government of the United States or of the District of Columbia, or any contractor or sub-contractor whose duty it shall be to employ, direct or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia, who shall intentionally violate any provisions of this act, shall be guilty of a misdemeanor."

The criminal intent was there made a part of the offense by express legislative enactment and the word "permit" was of necessity given the meaning here contended for by the defendant. But the act now under consideration expressly provides in section 3 that:

“In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents,” and this provision eliminates all questions of knowledge or criminal intent.

Nor can the expression, “all its officers and agents,” be limited to general officers and agents as claimed by the defendant. The knowledge of such general officers or agents is imputed to the company by the common law, and it is very apparent that the statute in question is not merely declaratory of the common law. As said by the court in the Taylor case, *supra*:

“In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the law by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that ‘no cars, either loaded or unloaded shall be used in interstate traffic which do not comply with the standard.’ There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability

to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employee and of the public. Where an injury happens through the absence of a safe draw bar there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to

diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words."

For these reasons I am of the opinion that the knowledge of the agent Longabaugh was the knowledge of the company and that the instructions given by his superior officer not to work excessive hours, or a want of knowledge on the part of his superior officers that he did in fact work excessive hours is no defense. I therefore adjudge the defendant guilty on all counts and impose a fine of \$100.00 and costs for each violation.

Endorsements: Opinion.

Filed in the U. S. District Court for the Eastern District of Wasihnngton, April 23, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

v's.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant,

Judgment

The above matter having come on for trial on the 20th day of April, 1914, the plaintiff being represented by Francis A. Garrecht, United States Attorney for the Eastern District of Washington, and Otis B. Kent, Special Assistant United States Attorney, and the defendant being represented by Hamblen & Gilbert, its attorneys, and trial by jury having been waived by the parties hereto after having been duly and regularly impaneled and sworn, and the case submitted to the court upon an agreed statement of facts; and the court having listened to arguments of counsel for the respective parties, and having filed its opinion finding the defendant guilty as charged in the complaint herein, it is, therefore,

ORDERED and ADJUDGED that the defendant, Oregon-Washington Railroad & Navigation Company, be, and the same is hereby fined in the sum of One Thousand (\$1000.00) Dollars, being One Hundred (\$100.00) Dollars for each cause of action set forth in the complaint; and it is further

ORDERED and ADJUDGED that the plaintiff, United States of America, do have and recover of

and from the said defendant its costs and disbursements herein incurred, taxed by the clerk in the sum of \$44.43.

Done in open court this 27th day of May, 1914.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Judgment.

Filed in the U. S. District Court for the Eastern District of Washington, May 27, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

In the District Court of the United States, Eastern District of Washington, Northern Division.

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

**Stipulation for Serving and Filing Proposed Bill
of Exceptions**

It is hereby STIPULATED, and agreed, by and between the above named parties, that the above named defendant may have until June 10th, 1914, within which to serve and file its proposed Bill of Exceptions herein.

Dated at Spokane, Washington, this 7th day of May, 1914.

(Signed) FRANCIS A. GARRECHT,

Attorney for Plaintiff,

(Signed) HAMBLÉN & GILBERT,

Attorneys for Defendant.

Endorsements: Stipulation Extending Time for
Preparing Proposed Bill of Exceptions.

Filed in the U. S. District Court for the Eastern
District of Washington, May 7, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

At Law—Bill of Exceptions

BE IT REMEMBERED, that on the 20th day
of April, 1914, at Spokane, Washington, the above
entitled action came regularly on for trial before the
Honorable Frank H. Rudkin, District Judge, the
Plaintiff appearing by Francis A. Garrecht, United
States Attorney, and Otis B. Kent, Special Assistant
to United States Attorney, and the defendant appear-
ing by Hamblen & Gilbert, its attorneys; a jury
was duly impaneled and sworn to try the cause,
after which counsel for the respective parties agreed
upon the facts and embodied the same in a stipulation,
the original of which is on file herein, as follows:

"IT IS HEREBY STIPULATED, that the Oregon-Washington Railroad & Navigation Company, is and was during the time hereinafter specified a common carrier by railroad, incorporated, organized, existing and doing business under the laws of the State of Oregon, and having an office and place of business at Wallula, in the State of Washington, and within the jurisdiction of this Court; and that it is and was during said time engaged in interstate commerce;

That on April 21st, 1913, and on each of the nine succeeding days thereafter, to and including April 30th, 1913, a certain employee of the said defendant, to-wit: M. W. Longabaugh, was and remained on duty as the agent of the said defendant at the said Wallula, from 7:00 A. M. to 7:00 P. M., on each of said dates, and thereafter remained on duty as a telegraph operator at the said Wallula, a continuously operated day-and-night office or station of the said defendant from 7:00 P. M. to 12:00 o'clock midnight, on each of said dates; and that the said M. W. Longabaugh was then and there engaged in the handling of orders pertaining to or affecting the movement of trains engaged in interstate commerce; that on said 21st day of April, 1913, and before he had performed any excess service, the said Longabaugh was instructed by his superior officer, not to work in excess of nine hours in any twenty-four hour period, either as agent or operator or in both capacities; that the said Longabaugh remained on duty longer than twenty-four hours as aforesaid in violation of

said instructions, and without the actual knowledge of the superior officers of said Longabaugh.

Dated at Spokane, Washington, this 20th day of April, A. D. 1914.

O. B. Kent, Attorney for Plaintiff.

Hamblen & Gilbert, Attorneys for Defendant.

Thereupon the jury was discharged from further consideration of the case and same was submitted to the court upon the petition and motion of the defendant that judgment be entered in favor of the defendant upon the ground and for the reason that upon the admitted and stipulated facts in the case, no violation of the law upon which the cause of action herein is based, has been established, but to the contrary, plaintiff has failed to make out or establish its cause of action upon any count alleged. The court having heard argument of counsel and having taken the case under advisement, denied such contention of the defendant and overruled its motion, to which ruling of the court the defendant notes its exception, and said exception is now allowed by the court and said court thereupon entered judgment in favor of the plaintiff and assessed a fine of \$100.00 for each count set forth in the complaint herein, being a total fine of \$1000 00, together with costs and disbursements of the plaintiff.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

AT LAW.

Stipulation Concerning Bill of Exceptions

It is hereby stipulated and agreed, by and between the plaintiff and the defendant, in the above entitled cause, by their respective attorneys, that the bill of exceptions hereto attached embodies all of the exceptions proposed by either party herein to said cause, and that there are no amendments or proposed amendments thereto; that said bill of exceptions may be settled by the Judge of said court in the manner provided by the rules of said court without objection by either party hereto.

Dated this 29th day of June, A. D. 1914.

(Signed) FRANCIS A. GARRECHT,

U. S. Attorney,

OTIS B. KENT,

Special Assistant U. S. Attorney,

Attorneys for Plaintiff.

(Signed) HAMBLÉN & GILBERT,

Attorneys for Defendant.

Endorsements: Stipulation.

Filed June 29th, 1914.

W. H. HARE, Clerk.

By F. C. Nash, Deputy.

Order Settling and Allowing Bill of Exceptions

The foregoing Bill of Exceptions, duly and within the time allowed by law, proposed by defendant, is hereby upon stipulation of the parties hereto, duly settled and allowed as defendant's bill of exceptions, and it is certified that the same contains the entire record submitted to the court and that same contains all evidence introduced upon the case and upon which the judgment of the court was rendered.

Dated this 3d day of August, A. D. 1914.

(Signed) Frank H. RUDKIN,

United States District Judge who presided at the trial of said cause.

Endorsements: Bill of Exceptions.

Received at the Clerk's office May 27, 1914, and filed, after being settled and allowed by Court, in the U. S. District Court for the Eastern District of Washington, August 3, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1751.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

AT LAW.

Petition for Writ of Error

And comes now the plaintiff in error, Oregon-Washington Railroad & Navigation Company, a corporation, (defendant in the action), and says, that on or about the 27th day of May, A. D. 1914, the above entitled District Court entered a judgment herein in favor of the plaintiff, United States of America, and against the defendant, Oregon-Washington Railroad & Navigation Company, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Error which is attached to and filed with this petition.

WHEREFORE, this defendant prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals

for the Ninth Circuit at San Francisco, California.

(Signed) A. C. SPENCER,

(Signed) HAMBLEN & GILBERT,

Attorneys for Plaintiff in Error, Oregon-Washington Railroad & Nav. Co.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No 1751.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

AT LAW.

Assignment of Error

Plaintiff in error, the Oregon-Washington Railroad & Navigation Company, hereby assigns the following errors committed by the trial court:

1. The trial court erred in overruling and denying the motion of the defendant made at the close of the case for judgment in its favor, which motion was made upon the ground that upon the admitted and stipulated facts in the case, no violation of law upon which the cause of action herein is based has been established, but to the contrary, the plaintiff had failed to make out or establish its cause of action upon any count alleged.

2. The trial court erred in entering judgment for the plaintiff upon the stipulation filed herein.

WHEREFORE, the plaintiff in error prays that said judgment of the District Court be reversed and the said District Court ordered to enter judgment dismissing the action.

(Signed) A. C. SPENCER,

(Signed) HAMBLÉN & GILBERT,

Attorneys for Plaintiff in Error.

On consideration of the foregoing petition and assignments of error attached thereto, the Court does allow the Writ of Error to Defendant, Oregon-Washington Railroad & Navigation Company, upon giving bond according to law in the sum of Fifteen Hundred and no-100 Dollars (\$1500.00), which shall operate as a supersedeas bond.

Dated this 4th day of August, 1914.

(Signed) FRANK H. RUDKIN,

United States District Judge for the Eastern District of Washington, Norther Division, who tried said cause and entered said judgment.

Endorsements: Petition for Writ of Error, Order Allowing Writ of Error and Assignment of Errors.

Filed in the U. S. District Court for the Eastern District of Washington, August 4, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 1751.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

AT LAW.

Writ of Error

(Lodged Copy)

The United States of America, Ninth Judicial District,
—ss.

The President of the United States, to the Honorable
Judge of the District Court of the United States,
for the Eastern District of Washington, Northern
Division, Greeting:—

Because in the record and proceedings, as also
in the rendition of the judgment, of a plea which is
in the said District Court before you, between the
United States of America, plaintiff, and the Oregon-
Washington Railroad & Navigation Company, a cor-
poration, defendant, a manifest error hath happened,
to the great damage of the said defendant, the Oregon-
Washington Railroad & Navigation Company, a cor-
poration, as by its complaint appears, we being willing
that error, if any hath been, should be duly corrected,
and full and speedy justice done to the parties afore-
said in this behalf do command you, if judgment be
therein given that then under your seal, distinctly
and openly, you send the record and proceedings afore-

said, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at San Francisco on the First day of September, 1914, in the said Circuit Court of Appeals for the Ninth Circuit, to be then and there held, that the record and proceedings being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 4th day of August, in the year of our Lord one thousand nine hundred and fourteen.

(Signed) W. H. HARE,
Clerk U. S. District Court for the Eastern District
of Washington, Northern Division.

By Frank C. Nash, Deputy.

(SEAL)

ALLOWED BY:

FRANK H. RUDKIN, Judge.

Endorsements: Service Accepted this 4th day of August, 1914.

(Signed) F. A. GARRECHT,
U. S. Attorney.

Writ of Error (Lodged Copy.)

Filed in the U. S. District Court for the Eastern District of Washington, August 4, 1914.

W. H. HARE, Clerk.
By Frank C. Nash, Deputy.

*In the United States District Court, for the Eastern
District of Washington, Northern Division.*

No. 1751.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error,

AT LAW.

Supersedeas and Cost Bond on Writ of Error

KNOW ALL MEN BY THESE PRESENTS,
that we, Oregon-Washington Railroad & Navigation
Company, (a corporation) as Principal, and National
Surety Company, (a corporation organized under the
laws of the State of New York for the purpose of
doing business as a surety, and which has complied
with the statutes of the United States authorizing it
to become a surety of bonds in the Courts of the
United States) as surety, are held and firmly bound
unto the United States of America in the just and
full sum of Fifteen Hundred Dollars (\$1500.00),
to be paid unto the said above named United States
of America, its attorneys, officers or assigns, to which
payment, well and truly to be made, we bind ourselves,
our successors and our assigns jointly and severally,
firmly by these presents.

Sealed with our seals and dated this 3d day of
August, A. D. 1914.

Upon the conditions that:

WHEREAS, lately at a session of the United States District Court for the Eastern District of Washington, Northern Division, in a suit pending in said court between the United States of America and the Oregon-Washington Railroad & Navigation Company, a corporation, a judgment was rendered against said defendant in the sum of One Thousand (\$1000.00), and costs amounting to Forty-four and 43-100 dollars (\$44.43); and,

WHEREAS, said defendant conceiving itself aggrieved thereby, has obtained from said Court a Writ of Error to reverse and correct said judgment in that behalf and a citation directed to the above named defendant in error admonishing said defendant in error to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California within the time therein fixed; and,

WHEREAS, an order has been entered requiring said defendant to file supersedeas bond and cost bond in the aggregate sum of fifteen hundred dollars (\$1500.00);

NOW, the condition of the above obligation is such that if the said Oregon-Washington Railroad & Navigation Company, a corporation, shall prosecute its said writ of error to effect, and answer all damages and costs if it fails to make its plea good in said court, then the above obligation to be void; otherwise to remain in full force and virtue.

This bond is intended as a bond for costs on appeal and as a Supersedeas Bond.

(Signed) OREGON-WASHINGTON RAILROAD
& NAVIGATION CO.,

By HAMBLÉN & GILBERT,

Its Agents and Attorneys.

(Signed) NATIONAL SURETY CO., OF N. Y.,

By JAMES A. BROWN,

Resident Vice President.

Attest: F. L. Jones, Res. Asst. Secty.

The foregoing Bond is hereby approved this 4
day of August, 1914, and the same when filed shall
operate as a bond for costs on appeal and as a
Supersedeas Bond.

(Signed) FRANK H. RUDKIN,

Judge.

Endorsements: Supersedeas Bond and Cost Bond
on Writ of Error.

Filed in the U. S. District Court for the Eastern
District of Washington, August 4, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern Division.*

No. 1751.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,

Plaintiff in Error,

v.s.

UNITED STATES OF AMERICA,

Defendant in Error,

AT LAW.

Citation on Writ of Error

(Lodged Copy.)

United States of America,

Eastern District of Washington,—ss.

TO THE UNITED STATES OF AMERICA. and
to Francis A. Gerrecht, its Attorney, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States, Eastern District of Washington, Northern Division, wherein the Oregon-Washington Railroad & Navigation Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Spokane in said district, this 4th day of August, 1914.

(Signed) FRANK H. RUDKIN,

(SEAL)

Judge.

Endorsements: Service of within Citation accepted this 4th day of August, 1914.

(Signed) F. A. GARRECHT, U. S. Attorney.

Citation. (Lodged Copy.)

Filed in the U. S. District Court for the Eastern District of Washington, August 4, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No. 1751.

UNITED STATES OF AMERICA,

Plaintiff,

v's.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

Praeceptum for Transcript

To the Clerk of the above-entitled Court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error to be perfected to said court, and include in said transcript the following proceedings, pleadings, papers, records and files, to-wit:

1. Complaint.
2. Answer.
3. Stipulation of Agreed Statement of Facts.
4. Stipulation Waiving Trial by Jury.
5. Opinion.
6. Judgment.
7. Bill of Exceptions and Certificate.
8. Assignment of Errors.
9. Petition for Writ of Error.
10. Order Allowing Writ of Error and fixing Bond.
11. Supersedeas Bond and Bond for Costs.
12. Citation.
13. Writ of Error.

14. Praecipe for Transcript of Record.

16. Stipulation Extending time to file Bill of Exceptions.

—and any and all records, entries, pleadings, proceedings, papers, filings necessary or proper to make a complete record upon said writ of error in said cause. Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

(Signed) ARTHUR C. SPENCER and
HAMBLÉN & GILBERT,

Attorneys for Defendant.

Endorsements: Praecipe for Transcript of the Record.

Filed in the U. S. District Court for the Eastern District of Washington, August 11, 1914.

W. H. HARE, Clerk.

By Frank C. Nash, Deputy.

*In the District Court of the United States, Eastern
District of Washington, Northern Division.*

No.-----

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

**Certificate of Clerk of U. S. District Court to
Transcript of Record**

UNITED STATES OF AMERICA,
Eastern District of Washington,—ss.

I, W. H. HARE, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing printed pages, numbered from 1 to 44, inclusive, constitute, and are a true and correct copy of the record, pleadings, testimony and all proceedings had in said action as called for by the defendant and the plaintiff in error in its praecipe for a transcript of the record herein, as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the annexed Writ of Error lodged and filed in my office on the 4th day of August, 1914. I also annex and transmit the original citation in said action.

I further certify that the cost of preparing, certifying and printing the foregoing transcript and record amounts to the sum of \$56.00, which sum has

been paid in full by Hamblen & Gilbert, attorneys for defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the city of Spokane, in the Eastern District of Washington, Northern Division, in the Ninth Judicial Circuit, this 25th day of August, 1914, and in the Independence of the United States of America, the one hundred and thirty-ninth.

(Signed) W. H. HARE,
Clerk, U. S. District Court for the
Eastern District of Washington.

(SEAL)

No. 9429

**United States Circuit Court of Appeals
for the Ninth Circuit.**

OREGON-WASHINGTON RAILROAD & NAVIGATION
COMPANY, A CORPORATION, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN
ERROR.

*UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION,*

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

FRANCIS A. GARRECHT,

United States Attorney.

PHILIP J. DOHERTY,

Special Assistant United States Attorney.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1914

Filed

SEP 21 1914

F. D. Monckton,

Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

OREGON-WASHINGTON RAILROAD & NAVI- gation Co., a corporation, plaintiff in error,	} No. —
<i>v.</i>	
THE UNITED STATES OF AMERICA, DE- fendant in error.	

*UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.*

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is an action in 10 counts alleging violations of the so-called "hours-of-service act" (34 Stat., 1415). These 10 counts relate to excessive service of one Longabaugh, an agent and telegrapher in the employ of the plaintiff in error on the 21st day of April, 1913, and on the nine next succeeding days.

The actual hours of service of Longabaugh on each of these days was from 7 a. m. until 12 o'clock

midnight. From 7 a. m. until 7 p. m. on the days alleged he was on duty as agent, and from 7 p. m. until midnight as telegraph operator. The interstate character of the railroad and of the service of this employee was admitted. (Rec., p. 28.)

As telegraph operator during the time specified when he acted as such he was engaged in handling orders pertaining to and affecting the movement of trains at Wallula, a continuously operated day and night office. (Rec., p. 28.) Before said Longabaugh had performed any of the excess service alleged he was instructed by his superior officer not to work in excess of 9 hours in any 24-hour period, either as agent or operator or in both capacities, and his excess service was without the actual knowledge of his superior officers.

The District Court overruled a motion of the carrier that judgment be entered in its favor, and a jury trial having been waived entered its judgment for the Government on each of the 10 counts involved. The case is here on writ of error based on two assignments of error.

The first assignment in substance is that the court erred in denying a motion for judgment for the defendant, and the second is that the court erred in entering judgment for the plaintiff. (Rec., p. 33.)

QUESTIONS INVOLVED.

If a railroad employee works in excess of the period fixed by law, is the carrier relieved from

penalty by reason of instructions given to said employee not to violate the law?

Is the railroad excused for such excess service when the superior officers of such employee have no knowledge of such excess service?

ARGUMENT.

The employee in question was regularly engaged in the work of this carrier for 19 hours a day for 10 days. The employment of other telegraphers must have correlated with Longabaugh's service. The office was connected with the train dispatcher's office by telegraph.

The hours when the office was open and an agent in charge must necessarily have been known by the superior officers. If no other station agent was employed there must have been such *general* knowledge of the situation at the office in question that the lack of specific knowledge as to Longabaugh's particular hours of service, while admitted as a fact, seems to furnish no defense to the carrier. It is a situation of ignorance of conditions where proper railroading seems to call for knowledge, even if railroading, as ordinarily conducted, does not seem to make knowledge of such conditions absolutely unavoidable.

However that may be, this case must stand upon the hypothesis that no superior official of this carrier had knowledge that Longabaugh was for 10 days working 19 hours a day.

Does lack of knowledge on the part of superior officers of excess service rendered by employees constitute a defense to the carrier in the prosecution for violation of the hours-of-service act?

Congress foresaw that this law would, in a marked degree, be unenforceable if the issue of the knowledge of superior officers of a railroad could be put in issue, aside from the application of the rule that knowledge and due care are not elements in this class of cases. (*St. Louis, Iron Mountain & Southern Railway v. Taylor*, 210 U. S., 281, and cases cited; *Chicago, Burlington & Quincy Railway v. United States*, 220 U. S., 559, and cases cited.)

Congress enacted a provision as follows:

In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of *all* its officers and agents. (Sec. 3.) [Our italics.]

Even though it is admitted that the excess service of said Longabaugh was not known to his superior officers that does not foreclose the question of the knowledge of any one of "all its officers and agents."

Again, as the learned judge of the District Court suggested (Rec., p. 22), the statute provides that the carrier shall be deemed to have knowledge of all acts of all agents, and this includes knowledge of the acts of Agent Longabaugh.

Broadly construed, the portion of section 3 referred to seems to have been intended to exclude entirely as a defense lack of knowledge of the hours of service of its employees.

Without any such provisions the safety-appliance act has been held to be absolute and to permit no defense of want of knowledge of defects in appliances.

When Congress has attempted to expressly exclude the question of knowledge vel non from the hours of service law, no narrow interpretation to the excluding clause should be applied which would restrict the application of the act where statutes of a similar character, not expressly attempting to legislate upon the question of knowledge, have been broadly interpreted to exclude the question of knowledge as an issue.

There may be, as to cases under this statute, a fair presumption that employees exceeding the statutory limitation are so clearly acting according to the presumed interests and intention of the employing carrier at that particular time and place that the carrier is concluded from raising the question of intent or knowledge.

Take the case in question: A continuously operated office had not a sufficient force of telegraphers to do the work. The agent, in addition to his own work, performed an additional stint of service as telegrapher each day to keep the service of his employer from suffering any impairment or delay.

May not this be so much in the interests of the employer that the latter should be concluded from any denial of knowledge or authority?

The *situation* was Longabaugh's authority to act in the employers' behalf upon the employers' re-

sponsibility to the law until the employer relieved the situation by furnishing an adequate force to perform the service without excess service on the part of any employee.

If the question of knowledge on the part of carriers is open, then *as to telegraphers especially* there is danger from men accommodating each other and performing additional shifts or turns of duty without knowledge of superior officials, and thereby enhancing the menace at which this law was aimed.

The public and the Government can only look to the carrier who has assumed the operations of a railroad to compel adherence to the limit of service fixed by Congress. The law deals with the carrier. The statute affixes a liability for a *carrier* permitting excess service as well as for officers and agents requiring or permitting excess service.

Is the carrier excused if the superior officials of a railroad order a telegrapher at a continuously operated day and night office not to remain on duty more than 9 hours, and such telegrapher remains on duty in the performance of the regular routine work of the carrier for 19 hours a day for 10 days?

Instructions to obey the law will not excuse if the law is violated.

The agent and operator in this case was at least passively permitted by the carrier to work in excess of the statutory period.

Perhaps the superior officers would be excused under the circumstances from the liability fixed by

this statute upon them personally, but the Government makes no admission that this would be so.

But the statute places a liability upon the corporation itself for permitting excess service; and here the corporation not only allowed and permitted the excess service, but fully availed itself for 10 days of the full benefits of the extra service of this agent.

A corporation may well be presumed to know the assignment and tours of duty of its employees.

“Require or permit,” as those words occur in this statute, may not be restricted to a technical or strictly literal interpretation, but may well be considered in view of the manifest purpose and intent of the act to have the meaning of “allow,” “suffer,” or “tolerate.”

The terms used, “require or permit,” show that the act was to have a more extended meaning than an intentional requirement or order. Thus the question of an affirmative order to do the work was eliminated.

“Permit,” without any forced construction may be read, “allow,” or perhaps “suffer” or “tolerate,” which are recognized synonyms.

“Permit” does not always retain its positive sense. It is often used with the sense of not preventing.

By this act it (Congress) sought to *prevent* railroad employees from working consecutively longer than the period prescribed, as completely and effectively as could be accomplished by legislation. (*United States v.*

Kansas City Southern Railway Co., 202 Fed., 828.)

The intent of Congress was to prohibit the excess service in the interest of public safety.

A prohibition by the carriers' officers, while laudable, is not of vital consequence when Congress has prohibited and penalized.

The express sanction or disapprobation of the carrier is negligible where the *law* prohibits and the carrier's employee for a continuous period is suffered and negatively permitted by the carrier to do the prohibited act under circumstances which come within the scope of the intent of Congress to promote safety.

The construction of the act herein contended for seems to have been adopted by District Judge Hazel in *United States v. Delaware, Lackawanna & Western R. Co.*, Western District of New York, May 22, 1914, not reported. In this case, charging the jury, Judge Hazel said:

This action is brought by the Government against the defendant railroad company to recover penalties for violation of the hours-of-service law, so called, enacted by Congress, in the year 1907, and *which absolutely prohibits railway employees, crews of trains, and dispatchers from remaining on duty for a longer period than 16 consecutive hours.* * * *

Now, this statute absolutely provides that the employees of railroad companies having charge of the movements of trains shall not

perform their duty more than 16 consecutive hours, unless conditions arise which exculpate or excuse the defendant, such as I have read.

Respectfully submitted.

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Special Assistant, United States Attorney.



No. 2470

United States
Circuit Court of Appeals
For the Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,
Plaintiff in Error,
v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiff in Error

**Upon Writ of Error to the United States District
Court, for the District of Washington,
Northern Division.**

United States
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**OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a corporation,**
Plaintiff in Error,
v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Names and Addresses of Attorneys of Record:

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For Defendant in Error.

STATEMENT OF THE CASE

This action was instituted by the United States of America against the Oregon-Washington Railroad & Navigation Company to recover ten penalties authorized by the Act of Congress, known as "An Act to promote the safety of employees and

travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (34 Stat. 1415).

The complaint contained ten causes of action, alleging over-service of one M. W. Longabaugh, occurring respectively on April 21 to April 30, 1913, inclusive, in which it is claimed that the plaintiff in error required and permitted Mr. Longabaugh to be and remain on duty as a telegraph operator and employee from the hour of 7 o'clock in the morning to the hour of 12 o'clock midnight of those respective and several days.

The length of service of Mr. Longabaugh upon the dates alleged was admitted, and a further defense set up (Trans., folio 14), in which it was claimed that during the dates from April 21 to April 30, 1913, both dates inclusive, it became necessary for the plaintiff in error for good cause, to discharge one of its telegraph operators and employees. This left only two operators at the station of Wallula for the performance of telegraphing service. The plaintiff in error inquired at various places likely to enable it to obtain an additional operator, namely, at Portland, Oregon, The Dalles, Pendleton and La Grande, Oregon, Walla Walla and Spokane, Washington, and elsewhere, but was unable to secure the services of an operator during said time, and thereupon did direct the said M. W. Longabaugh to work three

hours as a station agent and six hours as a telegraph operator, making a total period of nine hours in each 24-hour period; but that the said M. W. Longabaugh, without the knowledge of the plaintiff in error, or any of its officers or agents and against its will and consent, did erroneously construe said directions as to his work, and did work twelve hours as a station agent and six hours as an operator in each 24-hour period, and did so continue to work from the 21st day of April, 1913, to the 30th day of April, 1913, at which time the fact of the service of the said Longabaugh was discovered by and became known to the plaintiff in error, at which time the said work of said said Longabaugh immediately ceased, and was discontinued by the direct action of the plaintiff in error and its officers and agents.

These facts were not denied by the Government, but in addition thereto a stipulation was signed by the Government's and carrier's attorneys, confirming the jurisdiction of the court, the corporate and interstate character of the business of the plaintiff in error, the character of the work performed by Mr. Longabaugh; and that before he performed any over-service he was instructed by his superior officers and agents not to work in excess of nine hours in any 24-hour period, either as an agent or operator or in both capacities, and that whatever over-service Longabaugh performed, was in violation of his instructions and without

the actual knowledge of the superior officers of said Longabaugh.

A jury was waived (folio 18), and the cause submitted to the court for trial. The plaintiff in error petitioned and moved the court that judgment be entered in its favor upon the ground and for the reason that upon the admitted and stipulated facts in the case, no violation of law upon which the cause of action herein based, has been established, but to the contrary the Government has failed to make out or establish its cause of action upon any count alleged. This petition and motion was denied, to which the plaintiff in error requested and was allowed an exception.

The court thereupon entered a judgment in favor of the Government in the sum of One Hundred Dollars for each count set forth in the complaint, aggregating One Thousand Dollars, together with costs and disbursements of the action (folio 29).

SPECIFICATIONS OF ERROR

The lower court erred in overruling and denying the motion of plaintiff in error for judgment in its favor, upon the admitted and stipulated facts in the case, which motion was made at the close of the trial, and upon the ground that no violation of law had been established, but that the Government failed to make out or establish its cause of action upon any count alleged, and also that the

lower court erred in entering a judgment in favor of the Government and against the plaintiff in error. (Folio 33.)

POINTS AND AUTHORITIES

1. It was not the intention of Congress, in the enactment of the Hours of Service Act, that the carrier shall be deemed to have knowledge of the acts of its employees.

Sections 1 and 3, Hours of Service Act.

2. To "require and permit" the performance of any act, there must be shown to be knowledge on the part of the person charged with having required or permitted the act.

Gregory v. U. S., 10 Fed. Cases 1195, 1197.

City of Chicago v. Stearns, 105 Ill. 554, 558.

Wilson v. State, 46 N. E. 1050, 1051.

3. To "permit" an act, one must expressly authorize the act, or having knowledge thereof, acquiesce in its continuance.

Bd. of Education v. Bd. of Education, 3 Ohio
Dec. 70, 71.

Coon v. Froment, 49 N. Y. S. 305.

State v. Abrahams, 6 Iowa 117.

City of Chicago v. Stearns, 105 Ill. 554.

State v. Robinson, 55 Minn. 169, 171.

4. A statute which deprives a party of his opportunity of presenting his side of the case, or defense, is unconstitutional.

The United States of America

State v. Donato, 53 So. 662.

Banks v. State, 2 L. R. A. (N. S.) 1007.

State v. Beach, 36 L. R. A. 179.

Luria v. U. S., 231 U. S. 9.

5. A statute making a rule of evidence conclusive is unconstitutional in that it deprives one against whom the rule works of the due process of law, contrary to the fifth amendment of the Constitution of the United States.

State v. Griffin, 70 S. E. 292.

M. J. & K. Co. v. Turnipseed, 219 U. S. 35.

Bailey v. State of Alabama, 219 U. S. 219.

M. K. & T. v. Simonson, 57 L. R. A. 765.

6. In establishing a rule of evidence there must be a rational and logical connection between fact proved and fact presumed.

Opinion of Justices, 34 L. R. A. (N. S.) 771.

State v. Griffin, 70 S. E. 292.

M. J. & K. Co. v. Turnipseed, 219 U. S. 219.

7. The common law did not impute to the corporation the knowledge of all its officers and agents, but only when the knowledge was gained while acting for the corporation within the scope of their authority or with reference to the particular transaction.

2 Thompson Corp., Sec. 1646, 1649.

The Distilled Spirits, 11 Wall. (U. S.) 336, 356.

Rogers v. Palmer, 102 U. S. 263, 268.

Denver v. Sherret, 88 Fed. 226, 234.

Curtice v. Crawford Co., 118 Fed. 390, 394.

ARGUMENT

The sole question for consideration in this case is:

1. Whether or not the knowledge of the employee, Longabaugh, whose conduct was claimed to be or consisted in the violation of the Hours of Service Act, is the knowledge of the company where it appears as an undisputed fact that no officer or agent superior to this employee knew of his over-service, or in any sense knowingly required or permitted the excess service.

2. As a part of the above question, where an employee is instructed to work certain hours not amounting to excess or over-service, does a want of actual knowledge of said employee's over-service on the part of his superior officers or agents of the carrier constitute a defense?

Every fact necessary to raise these questions has been either admitted or stipulated. It will be conceded that the plaintiff in error did not **require** Longabaugh to be or remain on duty in excess of the period prescribed by the Hours of Service Act, but it is contended that the carrier did **permit** the over-service.

The word "permit" by the Century dictionary means:

"To suffer or allow to be, come to pass, or take place, by tacit consent or by not prohibiting or

hindering; allow without expressly authorizing; to grant leave or liberty to by express consent; allow expressly, give leave, liberty or license to."

The word "permit" in the Hours of Service Act implies affirmative action; that is, the carrier must affirmatively authorize or allow the employee to remain on duty for a longer period than that specified in the act or fail to prevent the over-service having knowledge of its rendition. It is conceded in this case that the carrier was not guilty of any affirmative action with respect to the over-service; but inasmuch as the over-service was rendered, it is contended that the carrier failed to prevent it having knowledge of its rendition. To charge the carrier with knowledge, it is urged that Longabaugh, the violator, knew of his violation; that no one else connected with the carrier knew it, particularly no superior officer. That Longabaugh's knowledge is the company's knowledge by virtue of the statute.

These views are denied by the carrier. The reasons in support of this denial are in part the following:

In the case of

Board of Education v. Board of Education,
3 Ohio Dec. 70, 71,

the word "permit" was defined as follows:

"Permit is defined: to grant permission, to give leave, to grant express license or liberty to."

And in

McHenry v. Winston, 105 Ky. 307; 49 S. W. 4,
it was held:

“The word ‘permit’ when used as an infinitive, is defined as meaning to allow, or giving leave, as in the familiar quotation, ‘Thou art permitted to speak for thyself.’”

Reference is made to the case of

Coon v. Froment, 49 N. Y. Supp. 305,
where it was held that by use of the word “per-
mit” affirmative action is implied.

The Supreme Court of Iowa in the case of

State v. Abrahams, 6 Iowa 117,
said:

“Mere inactivity on the part of a landlord, or his failure to take some steps to prevent an illegal use of the premises by the tenant, is not permitting him so to do, in the sense contemplated by the statute, making it criminal for a landlord to permit such a use of the premises. An affirmative assent is necessary, and if the landlord by any act or declaration affirmatively assents to the premises being so used, after he has knowledge of the purpose for which they are used, he is guilty. To make him liable there must be a consent to such use, either expressly given or by his acquiescence. A mere failure to interfere, or to prosecute or to prevent the illegal use, cannot be construed to amount to a permission or a silent affirmative acquiescence in such use.”

A rational construction of the Hours of Service Act in its application to cases where the affirmative action of the carrier is absent like the case at bar, contemplates the presence of knowledge on the part of the carrier before the violation is attendant with liability. If this were not true, Congress would not have said in section 3 of the Hours of Service Act:

“In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents.”

The lower court held this provision to eliminate all questions of knowledge or criminal intent. (See opinion, folio 22.) We submit the learned court is in error in this respect. It does not eliminate the necessity of knowledge, on the part of the carrier, but it supplies the proof of it and defines the kind of knowledge and the class of servants possessing the knowledge that shall bind the carrier and fix the liability for the employee's conduct.

It may be contended that the word “permit” as used in the Hours of Service Act should be construed to mean “allow” or “suffer.” Such contention is unsound.

Webster, in referring to the words “permit,” “allow” and “suffer,” says:

“Permit is the most positive, denoting a decided assent.”

City of Chicago v. Sterns, 105 Ill. 554, 558.

“As distinguished from ‘allow’ or ‘suffer,’ ‘permit’ is more positive, denoting a decided assent, either directly or by implication. ‘Allow’ is more negative, and denotes only acquiescence or an abstinence from prevention. ‘Suffer’ is used when our feelings are adverse, but we do not think best to resist.”

Board of Education v. Board of Education,
3 Ohio Dec. 70, 71.

“‘Permit’ as used in Acts 15th Gen. Assem. C 59 No. 1, making it unlawful for the keepers of a billiard saloon to permit a minor to remain in the saloon, implies express assent or license to do an act or the failure to prohibit it. If it is the duty of one to prohibit an act, and he fails to do so or to use efforts to do so, he permits the act which he could have prevented.”

State v. Probasco, 62 Iowa 400; 17 N. W. 607.

“The word ‘permit’ is more positive than the word ‘allow’ or ‘suffer,’ denoting a decided assent, either definition of the work, including knowledge of what is to be done under the permission, and intention that what is done is what is to be done; and hence entry of a saloon by a bartender at a time when the sale of liquor is forbidden without the proprietor’s knowledge, and against his orders, does not render the proprietor liable, under Acts 1895, p. 248 No. 3, forbidding him to permit any person except members of his family to enter at such times.”

Wilson v. State, 46 N. E. 1050, 1051.

The words "allow" or "suffer" do not find a place in the statute. By using the word "permit" in the Hours of Service Act the Congress used the most positive of the words synonymous therewith, and undoubtedly calculated that there should be present a decided assent to the over-service before denouncing the carrier for a penalty.

So the element of knowledge is absolutely necessary.

Gregory v. U. S., 10 Fed. Cas. 1195-1197.

Wilson v. State, 46 N. E. 1050, 1051.

City of Chicago v. Sterns, 105 Ill. 554, 558.

The Act under consideration provides:

"That it shall be unlawful for any **common carrier, its officers or agents**, subject to this Act, to require or permit any employee subject to this Act to be or remain on duty for a longer period than nine hours."

**ALL KNOWLEDGE POSSESSED BY OFFICERS
OR AGENTS NOT IMPUTED TO CORPOR-
ATION AT COMMON LAW.**

At common law the rule broadly stated as to charging corporations with the knowledge of their officers and agents is that notice communicated to, or knowledge acquired by, the officers or agents of corporations, **when acting in their official capacity**

or within the scope of their agency, becomes notice to or the knowledge of the corporation and is binding upon it.

2 Thompson Corp. Sec. 1646.

And even this rule has its limitations, but it is never extended and the cases are practically agreed that the corporation will not be bound by notice to any officer or agent unless the knowledge is acquired or notice given, while he is acting for the corporation generally or with reference to the particular transaction.

2 Thompson Corp. Sec. 1649.

The Distilled Spirits, 11 Wallace (U. S.) 336, 356.

Rogers v. Palmer, 102 U. S. 263, 268.

Denver v. Sherret, 88 Fed. 226, 234.

Curtice v. Crawford Co. Bank, 118 Fed. 390, 394.

The meaning of this rule is, that notice to or knowledge gained by an agent while acting for himself, or while acting for some one other than his principal, or while not acting in any matter of business, but pursuing his mere pleasure on the street or at his private residence, will not be notice to his principal; because, under such circumstances, the law will not indulge the presumption that he remembers it and communicates it.

2 Thompson, Sec. 1649.

The above stated rule is so faithfully supported by the cases cited by the learned author as to need only reference thereto for additional authority.

Now, the lower court, we think, misconceived the limitations and distinctions made by the common law, in its opinion (folio 22), wherein the following language was used:

“The knowledge of such general officers or agents is imputed to the company by the common law and it is very apparent that the statute in question is not merely declaratory of the common law.”

We do not object to the view that the statute is not merely declaratory of the common law, but we do object, with all due respect to the opinion of the learned judge, to the holding that “the knowledge of the general officers and agents is imputed to the company” under all circumstances without regard to how the knowledge was obtained.

Such holding overlooks the fact that knowledge by an officer or agent gained while acting for himself or for some one other than his principal or while not acting in any matter of the carrier's business but pursuing his mere pleasure, does not bind and is not imputed to the company at common law.

The reasoning of the learned judge is based upon the premise that the statute included something more than the common law, and that therefore it must include Longabaugh's knowledge as binding on the company.

The fault of the reasoning lies in the view of the extent the common law held an agent's knowledge binding.

Now, while we agree that the statute was intended to extend the common law, but we think it merely abolished the exceptions and limitations of the common law rule, so that the knowledge of the carrier's officials or agents, no matter how obtained, shall be imputed to the company; i. e. whether the knowledge was acquired casually, or while on mere pleasure bent and outside the scope of the officers or agents authority or employment, it is to be deemed the carrier's knowledge. But in a case like that at bar, where there was admittedly no knowledge, it is submitted there is none to be imputed.

Congress might have penalized the carrier every time an employee worked over-hours, as it did when a car lacked the U. S. standard safety appliances. But it certainly did not. It only penalized the party (officer or agent) and his carrier, for **requiring** or **permitting** the over-service.

To penalize for mere over-service would require very different kind of language from that used in the act, yet the Government's contention would read such differently required language into the act, and mere over-service was all the Government proved by which to claim a conviction. Such proof, we submit, falls far short of that necessary.

Suppose the Government desired to prosecute one of Longabaugh's superiors for a violation of

the Hours of Service Act, would proof of mere over-service be sufficient? Obviously not. We submit that in a given case the same quantum of proof required to convict the superior officer (officer or agent) is necessary before a conviction of the carrier can be claimed. For when it is shown by proof that the official or agent knew of the over-service and failed to prevent or stop it, then the statute imputes that knowledge to the carrier. A case which binds one, convicts the other.

This statute does not denounce the voluntary service of an employee of a railroad company, but if there shall be voluntary service on the part of the employee, plus knowledge of an officer or agent, the carrier is bound. If there was any doubt about the binding force of knowledge of an officer or agent of the carrier prior to the passage of the act, there can be none now, for the act provides that the carrier "shall be deemed to have the knowledge of all acts of all its officers and agents."

It is earnestly submitted to the court that there is no statute which declares the knowledge of the culprit to be the knowledge of the carrier, assuming the acts of Longabaugh in rendering over-service was culpable. It is the knowledge of that man in the company's employ who either directed him to render over-service, or knowingly failed to prevent him from so doing, that binds the company.

The plaintiff in error was confronted with this situation. For good cause it became necessary to discharge one of the operators at the station of

Wallula, Washington. It was a station operated continuously night and day within the meaning of the Hours of Service Act. Only two operators remained. An extraordinary effort to supply the deficiency by inquiring in Spokane and Portland, the termini of the railroad, and at The Dalles, La Grande and Baker and intermediate stations, to secure the services of another operator, but without success. And so the carrier, acting through its officers and agents, **being the same class of officers and agents upon whom the prohibition of requiring or permitting over-service was imposed**, directed Mr. Longabaugh to work nine hours at Wallula; six hours of which service was at the telegraph key and three hours other service. Mr. Longabaugh voluntarily and without actual knowledge of these **officers and agents, upon whom the prohibition of the statute rested**, voluntarily worked six hours as an operator and twelve hours otherwise, and when this voluntary service was discovered by or became known to the aforesaid officers and agents, the work of Longabaugh immediately ceased and was caused to be discontinued by the direct action of the carrier and its officers and agents. There could be no affirmative assent to this over-service under these facts.

Was there acquiescence in the performance of the excess service? Did the carrier and its officers and agents whose acts, in requiring and permitting the employee to render over-service, are made un-

lawful, have anything to do with Longabaugh's conduct? If they knew it, they did, but the Government agrees and admits that they did not know it. Therefore, the answer to the question is, that they did not have anything to do with the over-service. That they did not require or permit it. They did not affirmatively or actively authorize it, nor did they passively suffer, acquiescence, allow, tolerate or permit it; not for one moment.

The Hours of Service Act divides the servants of a railroad into two classes: (a) The officers and agents; (b) The employees. The Congress defined the term "employee" but did not define the terms "officers and agents," but a rational construction of the act would limit the meaning of the words "officers and agents" to that class of the carrier's servants having the right to direct the service of an "employee," for the act says:

"Section 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act, to be or remain on duty for a longer period than nine hours."

Here the Congress was referring to that class of the company's servants having the right to control the work of another servant, and proposed that the knowledge of the acts of said officer or agent having such control should bind the carrier; for it was further stated in the act:

“The common carrier shall be deemed to have had knowledge of all acts of all its officers and agents.”

Now, the carrier could not act except through a servant. The limitation of unlawfulness is placed upon only those servants of the common carrier having the right to direct the employment of others, namely, its officers and agents. Obviously, therefore, the Congress meant that if such **officer or agent** performed any act by their direction of the service of another, then the carrier shall be deemed to have had knowledge of such acts, because, and for that reason only, the Congress intended to make the act of such officer and agent unlawful and not the mere act of the employee in performing the over-service.

Now, the Congress did define the term “employee.” We quote from section 1:

“And the term ‘employee’ as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.”

An operator is an employee within this definition. It is suggested that in a proper case a penalty is recoverable alike against the carrier or its officers and agents; if these particular officers and agents thus chargeable were the officers and agents requiring or permitting the over-service; but it is also very clear that this penalty recoverable against the carrier, its officers and agents cannot be recov-

ered against the employee performing the over-service.

Congress might have enacted legislation penalizing the employee performing the over-service, but it did not. The employee was omitted doubtless from the fact that mere over-service was not regarded as necessary to come within the prohibition of the statute.

It was the requiring, the permitting of this over-service by some other person, namely, an officer or agent of the carrier, that was to be denounced by the statute as unlawful.

We submit, therefore, that it was the knowledge of this third person in a capacity of an "officer or agent" and not in the capacity of an "employee" performing the over-service which was to carry with it binding force upon the carrier.

The Hours of Service Act is penal in character, and while it should be construed as remedial acts are construed so as to accomplish the objects and purposes of the Congress, yet it is also to be construed strictly in that it shall not be made by construction to include acts beyond the purview of the meaning of the statute and beyond the intention of the Congress.

It would have been very easy to include a provision in the Hours of Service Act making the knowledge of the employee performing over-service, the knowledge of the carrier, but Congress did not

see fit to do so, and surely we cannot read into a statute a word, a sentence or a meaning not covered by the statute. The words of the statute were selected with care and the binding knowledge defined therein is limited to that possessed by the officers and agents, and the knowledge of the employee performing the over-service is omitted therefrom.

The lower court, we feel, misunderstood our contention in having stated that the carrier contended that the expression "all its officers and agents be limited to general officers and agents."

We merely contend and in this we insist that we are supported by the proper construction of the act itself as well as good reason and logic, that the carrier is not to be bound under this statute by the knowledge that the employee performing the over-service has or should have that he is violating the law. The only knowledge shown in this case of the over-service at the time of its rendition is the knowledge possessed by Longabaugh, and we contend that Longabaugh's knowledge is not the carrier's knowledge. We insist that the Government must show that some other person who has the right to direct this employee's service, whether it be a general officer or agent or any other person of lesser authority, had knowledge of the over-service before a conviction can be claimed. It is the knowledge of the acts of this latter official,

agent or person that the statute declares shall be deemed to be the knowledge of the carrier.

A construction of the Hours of Service Act which makes the knowledge of the employee performing over-service the knowledge of the carrier, is tantamount to a conclusive presumption of the knowledge on the part of the carrier of the unlawful and prohibited acts of the employee. A statute so prohibiting is unconstitutional in that it deprives a carrier of the due process of law. It deprives the carrier of the right to defend. Such construction would obviously impute to the carrier something which it had not, and which it could not by any means place itself in a position of obtaining unless it employ men to constantly watch each employee. If the Hours of Service Act is to be construed that the carrier is deemed to have the knowledge of the guilty party, the knowledge of the culprit, then the door would be opened to the systematic penalization of the carrier by the unauthorized and voluntary performance of over-service. The only thing that would protect the carrier would be the conscience of the Government in declining to prosecute such carrier.

It is a fundamental rule of law, too well established to admit of contravention, that the legislature may, generally speaking, prescribe rules of evidence, but a chance, if, indeed, it be a fighting chance must be left the party to make his defense.

Quoting from the opinion of the court in the case of

State v. Beach, 36 L. R. A. 179, 182,
it was said:

“A law which would, in effect, exclude the evidence of a party, and thereby deny him the right to be heard, would deprive him of due process of law.”

While the Legislature may say that evidence of certain facts shall be prima facie evidence of guilt or of the existence of other facts, but the right to rebut this prima facie case is not to be denied the party against whom the evidence is offered.

The Senate of the Commonwealth of Massachusetts obtained an opinion of the justices of the Massachusetts Supreme Judicial Court, relating to the constitutionality of an act to constitute eight hours a day's work for public employees.

208 Mass. 619; 34 L. R. A. 771.

Section 5 of the act, concerning which their opinion was desired, provided that the mere fact of over-service “shall be prima facie evidence of the violation of the provisions of this act.” There were circumstances under the act in which more than eight hours' work could be performed, and it was not true that in all cases that more than eight hours' work was prohibited.

The justices said:

"We are of the opinion that the Legislature has no constitutional authority to punish any citizen merely upon evidence of the existence of a fact which in ordinary cases has no tendency to establish guilt."

We contend that the mere fact of over-service has absolutely no tendency to establish that the carrier **required or permitted** the employee so to work.

In the case of

Goldstein v. Maloney, 57 So. 342,
the court said:

"It is competent for the Legislature to create by law prima facie presumptions of evidence without denying the process of law where such presumptions may be a natural or reasonable inference from the facts or circumstances from which the presumptions are raised by the statute, and the opposite party is not deprived of the right to rebut the presumptions in some fair manner duly provided or accorded by the rules of law or procedure."

While the fact of over-service is necessary to be proven before a conviction can be obtained, yet if the construction contended for by the Government be the correct one, all that would be required to prove is the fact of over-service. We contend that such legislation is not a competent exercise of Congressional power and contravenes the fifth amendment to the United States Constitution.

See also in this connection:

Lindsley v. Natural Carbonic Gas Co., 220
U. S. 61.

Mobile etc. Ry. Co. v. Turnipseed, 219 U. S.
35.

Mr. Justice Lurton, speaking for the court in the latter case, said:

“It is essential that there shall be some rational connection between the fact proved, and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be purely arbitrary mandate.”

If voluntary over-service by an employee or prohibitive service by an employee is all that is necessary for the Government to prove to sustain a conviction under the Hours of Service Act, then it must follow that from this fact of over-service the statute presumes knowledge on the part of the carrier's officers and agents, and this knowledge is imputed to the carrier, and then the statute presumes that the carrier required or permitted the unlawful act, and from these facts a conclusion of guilt arises. Such construction presumes the statute in question shall supply by arbitrary mandate the facts necessary to establish guilt in addition to the mere performance of over-service.

In the case of

State v. Beach, 36 L. R. A. 179,
it was said:

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"A law which provides that certain facts are conclusive proof of guilt would be unconstitutional as also would one which makes an act *prima facie* evidence of crime which has no relation to criminal act."

In the instant case no person had knowledge of the over-service, the scope of whose authority included the power to prevent it, and the carrier could take no additional means than that which it did take to relieve itself of acts denounced by the statute.

It is absolutely impossible for the carrier's officers and agents to be at all times present to keep a check upon the employees, and the best that can be done is to fix the limits of the service, insist upon compliance and discharge the employee for a violation.

The lower court held that the statute declared the knowledge with carrier's officers and agents to be the knowledge of the carrier, including Longabaugh's knowledge of his own unlawful acts. The case differs from the violations of the Safety Appliance Act.

It has been held that want of knowledge of defects in safety appliances was no defense, for the very simple reason that the carrier, or some one in its employ, was charged by statute with the duty

of equipping cars with automatic coupling grab-irons and other safety devices; that it would be a violation of this duty not to do so, but if we could for the moment assume that automatic coupling grab-irons or other safety devices had life and human activity and the power to voluntarily do a prohibitive act, as Longabaugh had, then an entirely different situation would appear. The voluntary act of the humanized automatic coupler and the like, would not be the act of the carrier. We see no analogy between the safety appliances cases and those arising under the Hours of Service Act.

The question is squarely before the court as to whether or not Longabaugh's knowledge of his own unlawful act, which obviously he must always have, is the knowledge of an officer or agent. If it is, then Longabaugh must be an officer or an agent, and if so, he must be in the class of officials and agents that would subject themselves by requiring or permitting over-service to the same penalties, obligations and responsibilities that the carrier is subject to if the Government should chose to protect him.

Now, it would not be contended that he, Longabaugh, was such person. It was not intended by Congress that the man performing the over-service was to be punished, and if he is in that class he cannot be in the other class, and consequently his knowledge is not the knowledge of the carrier.

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For these reasons, we submit that the judgment of the lower court should be reversed with directions to dismiss the complaint.

Respectfully submitted,

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